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Supreme Court, U.S.
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No.

Supreme Court of the United States

MICHAEL CERVINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.) Where a Supreme Court decision has narrowed the scope of a criminal statute by changing the definition of a crime, does a criminal defendant's general acquiescence during his plea colloquy that he committed the crime preclude a finding of "actual innocence" where the wording of the colloquy was not only rendered ambiguous by the Supreme Court's decision but the terms used were so ambiguous that appellate judges could not agree on their meaning?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Tenth Circuit.

More specifically, the Petitioner Michael Cervini and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	Page:
Question Presented	i
List of Parties to the Proceedings in the Courts Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	3
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	3
Statement of the Case	6
Reasons for Granting the Writ	23
1.) THIS COURT SHOULD GRANT MR. CERVINI'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE SHOWING NECESSARY TO DEMONSTRATE "ACTUAL INNOCENCE" AFTER A PLEA OF GUILTY WHEN THE REACH OF THE STATUTORY VIOLATION TO WHICH THE DEFENDANT PLEADED IS SUBSEQUENTLY NARROWED BY THIS COURT	**23**
1A.) The Circuit Courts, As Well As The Judges Of The Tenth Circuit, Are Divided By The Weight To Be Granted To A Defendant's Use Of Words For Which The Meaning Has Been Changed By Supreme Court Decisions When Determining	

Whether The Defendant Can Demonstrate "Actual Innocence" 24

1B.) The Plea Colloquy In Petitioner's Case Failed To Unequivocally Establish, Or Even Establish By A Preponderance Of The Evidence, That An "Actual Minor" Was Used In Creation Of The Single Digital Image Posted On The Internet; As Such, The Colloquy Should Not Have Been Used To Defeat Petitioner's Claim Of "Actual Innocence" And, Thereby, Defeat His Entitlement To A Ruling On His "Merit Claim" Of Violation Of His First Amendment Rights.....27

Conclusion.....30

Appendix:

USCA Opinion Dated 8-11-04 .....A

USDC Judgment & Commitment Order Entered 9-29-00.....B

USCA Denial of Rehearing Dated 9-22-04 C

USCA Opinion Dated 7-31-01 .....D

USDC Denial of Section 2255 Motion Dated 4-30-03 .....E

USDC Denial of Request for Certificate of Appealability Dated 5-28-03 .....F

Order Granting Request for Certificate of Appealability Dated 12-11-03.....G

TABLE OF AUTHORITIES

Page:

Cases

Ashcroft v. Free Speech Coalition,
2002 U.S. LEXIS 2789 (4-16-02).....*7, 8, 9*

Bailey v. United States,
516 U.S. ___, 116 S.Ct. 501,
133 L.Ed.2d 472 (1995) *27*

Bousley v. United States,
523 U.S. 614, 140 L. Ed. 2d 828,
118 S. Ct. 1604 (1998).....*passim*

Braxton v. United States,
500 U.S. 344,
114 L.Ed.2d 385, 111 S.Ct. 1854 (1991) *27*

Montana v. Hall,
481 U.S. 400, 406,
95 L.Ed.2d 354, 107 S.Ct. 1825 (1987).....*26*

Osborne v Ohio,
495 U.S. 103; 110 S. Ct. 1691;
109 L. Ed. 2d 98;
1990 U.S. LEXIS 2036 (1990).....*10*

Schlup v. Delo,
513 U.S. 298; 115 S. Ct. 851;
1995 U.S. LEXIS 701;
130 L. Ed. 2d 808 (1995) *24*

Stinson v. United States,
508 U.S. ___, ___, and [n.],
123 L.Ed.2d 598, 605 and [n. 2],
113 S.Ct. 1913 (1993) *27*

United States v. Benboe,
157 F.3d 1181; 1998 U.S. App. LEXIS 24417
(9th Cir. 1998).....*25, 28*

United States v. Boyd,
312 F.3d 213; 2002 U.S. App. LEXIS 24483
(6th Cir. 2002).....*26*

United States v. Cervini,
379 F.3d 987; 2004 U.S. App. LEXIS 16543
(10th Cir. 8-12-04) *8, 22, 25*
United States v. Harms,
371 F.3d 1208, __ (10th Cir. 2004) *19*
United States v. Mendoza,
464 U.S. 154, 78 L.Ed.2d 379,
104 S.Ct. 568 (1984) *27*
United States v. Montano,
381 F.3d 1265; 2004 U.S. App. LEXIS 18159
(11th Cir. 200) *26, 28*
United States v. Pearl,
324 F.3d 1210, 1214 (10th Cir. 2003) *19*
United States v. Sanders,
157 F.3d 302; 1998 U.S. App. LEXIS 25452
(5th Cir. 1998) *25, 28*
United States v. Waucaush,
380 F.3d 251; 2004 U.S. App. LEXIS 18137
(6th Cir. 2004) *25, 28, 29*

Statutes

18 U.S.C. § 2252A *3*
18 U.S.C. § 2256(8)(A) *14*
18 U.S.C. § 2256(8)(C) *14*
28 U.S.C. § 1254(1) *3*
28 U.S.C. § 1746 ..... *12*

Other Authorities

Rule 2 of the Rules Governing
Section 2255 Proceedings *6*
Rule 8 of the Rules Governing
Section 2255 Proceedings *11*

Rules

Supreme Court Rule 10 ..... *23, 24*
Supreme Court Rule 10(a) *26*

PETITION FOR A WRIT OF CERTIORARI

Michael Cervini, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on 8-11-04.

OPINIONS BELOW

The 8-11-04 opinion of the Court of Appeals for the Tenth Circuit, whose judgment is herein sought to be reviewed, is reported at 379 F.3d 987; 2004 U.S. App. LEXIS 16543, and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Tenth Circuit on 9-22-04. This opinion is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Western District Of Oklahoma, entered on 9-29-00, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Tenth Circuit in the direct appeal in this case, entered on 7-31-01, is an unpublished decision reported at 2001 U.S. App. LEXIS 17105, and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the Western District Of Oklahoma, denying Mr. Cervini's motion pursuant to 28 U.S.C. § 2255, entered on 4-30-03, is an unpublished decision, and is reprinted in the separate Appendix E to this Petition.

The prior opinion and judgment of the United States District Court for the Western District Of Oklahoma, denying Mr. Cervini's Request for Certificate of Appealability, entered on 5-28-03, is an unpublished decision, and is reprinted in the separate Appendix F to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Tenth Circuit, granting a Certificate of Appealability, entered on 12-11-03, is an unpublished decision, and is reprinted in the separate Appendix G to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 8-11-04. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law ... abridging the freedom of speech." *Id.*

18 U.S.C. § 2252A provides in relevant part:

> § 2252A. Certain activities relating to material constituting or containing child pornography
>
> (a) Any person who--
>
> (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
>
> (2) knowingly receives or distributes--
>
> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;
>
> * * * * * * * * * * *
>
> (B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or

any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

* * * * * * * * * * *

shall be punished as provided in subsection (b)... *Id.*

18 U.S.C. § 2256 provides:

§ 2256. Definitions for chapter

... (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual

depiction of a minor engaging in sexually explicit conduct; and

(9) "identifiable minor"--

(A) means a person--

(i)

(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor. *Id.* (As amended Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 2)], 110 Stat. 3009-27.).

STATEMENT OF THE CASE

On 9-26-00, Mr. Cervini was sentenced to 27 months incarceration plus 3 years supervised release for violations of 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A, 18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3). This sentence does not expire until approximately 9-10-05. (Appendix, Exhibits B and C)

On 5-2-02, Mr. Cervini filed a motion pursuant to 28 U.S.C. § 2255 with the District Court for the Western District Of Oklahoma.

On 9-4-02, Mr. Cervini filed an *amended* motion pursuant to 28 U.S.C. § 2255 with the District Court for the Western District Of Oklahoma. In this motion, Mr. Cervini pleaded, *inter alia*:

> **STATEMENT OF CLAIM**
>
> 1.) Pursuant to Title 28, United States Code, Federal Rules of Civil Procedure 8-11, and Rule 2 of the Rules Governing Section 2255 Proceedings, Defendant-Movant Michael Cervini, 14508-064, states the following claims for relief under 28 U.S.C. § 2255.
>
> 2.) These claims for relief incorporate the attached Section 2255 Model Court Form, as well as the information contained therein as if set forth in full herein.
>
> 3.) ¶On or about 12-7-99 Michael Cervini was charged with violation of 18 U.S.C. § 2252A(a)(1) (Transportation Of Child Pornography In Interstate Commerce By Posting Images Of Child Pornography At A Newsgroup Site In The Internet) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A,

18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3). (Appendix, Exhibits A-C)

4.) These charges arose from the fruits of the execution of a search warrant for Mr. Cervini's home and home computer. The search warrant was requested after an undercover agent reviewed an image of child pornography[1] posted twice onto a Usenet newsgroup "alt.binaries.pictures.erotica.pre-teen"...

24.) On or about 9-26-00, Mr. Cervini pleaded guilty to violations of 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A, 18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3). The plea was a "conditional plea", made pursuant to Federal Rule of Criminal Procedure 11(a)(2), which allowed Mr. Cervini to appeal the denial of his motion to suppress to the Court of Appeals.[2] (Appendix, Exhibits A-C)

25.) On 9-26-00, Mr. Cervini was sentenced to 27 months incarceration plus 3 years supervised release for violations of 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A,

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[1] Reference to the term "child pornography" refers to the definition set forth in 18 U.S.C. § 2256(8) which has been subsequently declared unconstitutional by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02). Mr. Cervini does not concede that any material involved in his case constitutes "child pornography" in light of *Ashcroft*.

[2] The plea agreement did, however, waive Mr. Cervini's right to appellate review of other sentencing issues and of the forfeiture of certain seized computer related items.

18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3). This sentence represented a Total Offense Level of 18 and a Criminal History of "I". (Appendix, Exhibits A-C)

* * * * * * * * * * *

31A.) On 4-16-02, subsequent to the conclusion of Mr. Cervini's direct appeal, the Supreme Court handed down its decision in *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02). In this case, the Supreme Court held that definitions of elements of 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2252A(a)(1) were unconstitutionally "vague" and "overbroad" due to the inclusion of the phrases "appears to be" a minor, and "conveys the impression" that the depiction portrays a minor in the "definitions" section of the statute, 18 U.S.C. § 2256.

31B.) It is impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense in Mr. Cervini's case were actual identifiable minor children.[3]

31C.) It is impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense in Mr. Cervini's case were not simply computer

---

[3] While there are references to "images" and "children" and "persons", there was in fact only ***one image*** of what appeared to be a minor involved in this case. . *United States v. Cervini*, 379 F.3d 987; 2004 U.S. App. LEXIS 16543 ** 20 [n. 6] (10th Cir. 8-12-04) The same image had been posted on the internet and was found in Mr. Cervini's computer after execution of a search warrant. Apparently this and the statutory language are where the plural terms originated.

generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors.

31D.) Mr. Cervini is actually innocent of all of the charges in the indictment, both the count to which he pleaded and the count which was dismissed.

CLAIM NUMBER TWO

44.) Mr. Cervini restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-31, herein.

44A.) As a result of the Supreme Court decision in *Ashcroft v. Free Speech Coalition*, 2002 U.S. LEXIS 2789 (4-16-02) , Mr. Cervini's plea was not knowing or intelligent. He was misinformed and was not advised as to the true nature and the elements of the offense.

44B.) Had Mr. Cervini been fully advised as to the true nature and elements of the offense, there is a reasonable probability he would have pleaded not guilty and proceeded to trial.

45.) Mr. Cervini's conviction and sentence under 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A, 18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3) is violative of his First and Fifth Amendment constitutional rights because he was convicted and sentenced under a statute which is unconstitutionally "vague" and "overbroad" due to the inclusion of the phrases "appears to be" a minor, and "conveys the impression" that the depiction portrays a minor in the "definitions" section of

the statute, 18 U.S.C. § 2256. These phrases and definition apply to the entire Chapter 110 of the Code which covers crimes under sections 18 U.S.C. § 2251 thru 18 U.S.C. § 2260. Since Mr. Cervini was convicted and sentenced under 18 U.S.C. § 2252A(a)(5)(B)

46.) Mr. Cervini's sentence under 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2); 18 U.S.C. § 2252A, 18 U.S.C. § 2253(a)(1), (a)(3) (Forfeiture) (Count 3) constitutes a fundamental defect, a complete miscarriage of justice, and is tantamount to a violation of the Due Process Clause of the Fifth Amendment

* * * * * * * * * * *

48.) This Court has jurisdiction to entertain, rule on the merits, and grant relief in Claim Number Two under 28 U.S.C. § 2255 and the principles of *Schlup v. Delo*, 513 U.S. ___, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995) and *Osborne v Ohio*, 495 U.S. 103; 110 S. Ct. 1691; 109 L. Ed. 2d 98; 1990 U.S. LEXIS 2036 (1990)

STATEMENT AS TO WAIVER, CAUSE, AND PREJUDICE

* * * * * * * * * * *

55.) This Court is not precluded by the principles of waiver, cause, and prejudice, from reaching the merits of Claim Number Two and granting the requested relief because the claim is subject to the "actual innocence exception" to procedural bar. *Schlup v. Delo*, 513 U.S. ___, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995); *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998)

JUDGMENT REQUESTED

57.) Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings, Mr. Cervini asks this Honorable Court to **ORDER** an evidentiary hearing where he can prove the allegations herein by: (A) his own testimony; (B) the testimony of Attorney Mack K. Martin; (C) the testimony of Special Agent Terry Wade; (D) the testimony of Richard Deters, P.O. Box 6035, Minneapolis, MN 55406; (E) the testimony of R.R. "Jack" Sorrelle, Jr. of Inventive Technology, Ltd., P.O. Box 706, 107 Carter Road, Elk City, OK 73648; (F) additional evidence; and (G) legal argument to be presented at the hearing.

58.) Upon proof of Mr. Cervini's allegations herein, Mr. Cervini asks this Honorable Court to:

59.) **ORDER** that Mr. Cervini's conviction be **VACATED** and his indictment be **DISMISSED**.

MOTION FOR DISCOVERY

* * * * * * * * * * *

60A.) Mr. Cervini respectfully moves this Court to **ORDER** that the government make a copy of the images seized by the government available to counsel for examination. Mr. Cervini asks that the copy of the images be recorded onto a "CD" or "compact disk" in the same format in which they were received by the government. Mr. Cervini proffers to the Court that examination of the images by an expert of counsel's choosing will support his allegations set forth in ¶¶31B-31D, herein.

VERIFICATION

61.) The facts set forth in ¶¶3, 5, 10-31, 44B herein are based on the personal knowledge of Mr. Cervini and are true and correct. The rest of the allegations are pleaded on information and belief.

Signed under penalty of perjury under 28 U.S.C. § 1746 this ___day of _____, 2002

_____

Michael Cervini
Defendant-Movant
14508-064
P.O. Box 898801
Oklahoma City, OK 73189-8801

(Section 2255 motion, Statement of Claim) (emphasis added)

It should be emphasized and repeated that the amended motion specifically pleaded Mr. Cervini's "actual innocence" in the following paragraphs:

31B.) It is impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense in Mr. Cervini's case were actual identifiable minor children.

31C.) It is impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense in Mr. Cervini's case were *not* simply computer generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors.

31D.) Mr. Cervini is actually innocent of all of the charges in the indictment, both the

> count to which he pleaded and the count which was dismissed.
>
> * * * * * * * * * *
>
> 55.) This Court is not precluded by the principles of waiver, cause, and prejudice, from reaching the merits of Claim Number Two and granting the requested relief because the claim is subject to the "actual innocence exception" to procedural bar. *Schlup v. Delo*, 513 U.S. ___, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995); *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998)

(Statement of Claim, ¶¶31B-31D, 55)

Based on the foregoing allegations, argument, and attached verified exhibits, Mr. Cervini asked the District Court for an evidentiary hearing where he could prove his case.

The government responded to the amended motion by arguing, *inter alia*, that Mr. Cervini's plea was valid under 18 U.S.C. § 2256(8)(A) or 18 U.S.C. § 2256(8)(C), on two grounds.

The government attorney's first argument or ground, was that the plea agreement stated that Mr. Cervini agreed to the following statement:

> ... On or about September 7, 1999, in Weatherford, Okla., I knowingly possessed an image of child pornography which was contained in my computer and which I accessed from the internet, and the image of child pornography was produced using materials that had been shipped and transported in interstate commerce by any means, including by computer.

(Government response to Section 2255 motion, page 15)

The government attorney's argument was that the admission that he'd possessed "child pornography" was sufficient to establish a factual basis. *Id.*

The government attorney's second argument or ground, was based on the following colloquy:

> Q. As to Count Two of the indictment, on or about September 7, 1999, in Weatherford, Oklahoma did you knowingly possess images of child pornography that were contained in your computer?
>
> A. Yes, I did.
>
> Q. Did the images show persons under the age of 18 engaged in sexually explicit conduct?
>
> A. Yes.

(Government response to Section 2255 motion, page 16)

The government attorney argued that the general term "persons" specifically meant an actual, identifiable human being and further argued that the colloquy established a factual basis for conviction and sentence under the definitions set forth in 18 U.S.C. § 2256(8)(A) and 18 U.S.C. § 2256(8)(C), even though, under the law at the time of the plea, it was irrelevant whether the 'persons' were actual identifiable human beings or were "morphed" or electronically modified images of "persons".[4]

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[4] Either way, Mr. Cervini could be found guilty under the federal law prior to *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02), so it never even occurred to either the District Court, the AUSA, or Mr. Cervini, whether the "persons" were actual identifiable human beings or were "morphed" or electronically modified images of "persons". Significantly, the government has never disputed that the image was computer generated or modified virtual images instead of images of actual, identifiable minors.

Mr. Cervini filed a traverse to the government response to his Section 2255 motion. In the traverse, Mr. Cervini argued, *inter alia*, that his *Ashcroft* claim was constitutionally indistinguishable from the claim this Court found meritorious in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). Mr. Cervini also submitted additional evidence of his actual innocence of the charges by submitting a verified copy of the 5-1-02 Testimony of Ernest E. Allen, President, National Center For Missing And Exploited Children, Before United States House of Representatives. In this exhibit, Mr. Allen testified under oath that "graphics software packages and computer animation are being used to manipulate or 'morph' images and to create 'virtual' images indistinguishable from photographic depictions of actual human beings." As further evidence of his actual innocence of the charges, Mr. Cervini submitted a verified copy of a software advertisement, demonstrating the technique of "morphing" images to produce virtual images that are indistinguishable from images of actual, identifiable minors or children. Finally, Mr. Cervini pointed out that ***the phrase "actual minor" did not appear in the plea colloquy***. It never came up.

The District Court, by its order entered on 4-30-03 denied the Section 2255 motion without an evidentiary hearing and without allowing discovery. In the District Court's order, the Court held that his challenge to his plea of guilty was procedurally barred on the grounds that he had failed to establish "cause" under *United States v. Frady*, 456 U.S. 152, 167-68, 170 (1982) or "actual innocence" under *Schlup v. Delo*, 513 U.S. ___, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995) for review of the merits of his challenge to his plea of guilty, conviction and sentence for violation of 18 U.S.C. § 2252A(a)(5)(B) (Possession of Child Pornography) (Count 2). The District Court's reasoning was that, during the plea colloquy, Mr. Cervini had responded in the affirmative when questioned by the prosecutor whether the image "show[ed] persons under the age of 18 engaged in sexually explicit

activity". The District Court held that this so-called admission made it impossible for Mr. Cervini to demonstrate actual innocence. (Appendix E)

On 5-19-03 Mr. Cervini filed a timely notice of appeal from the District Court denying the motion. On or about 5-19-03, Mr. Cervini also requested the District Court to grant a Certificate of Appealability to appeal the denial of his motion to this Court.

On 5-28-03, the District Court denied the request for a Certificate of Appealability. (Appendix F)

Mr. Cervini filed a combination 'merit brief' and renewed request for Certificate of Appealability with the Court of Appeals for the Tenth Circuit per circuit rules. In the brief, he renewed his argument that he had demonstrated both a valid gateway claim of actual innocence and a merit claim of denial of his First Amendment rights under *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02).

On 12-21-04, the Court of Appeals granted a Certificate of Appealability as to whether :

> ... we grant Mr. Cervini a COA on his First Amendment claim based on Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). We order the parties to respond to the following issues:
>
> (1) Whether *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), can be applied retroactively to Mr. Cervini's case, in light of the Supreme Court's holdings in *Teague v. Lane*, 489 U.S. 288 (1989) and *Bousley v. United States*, 523 U.S. 614 (1998).
>
> (2) Whether Mr. Cervini has satisfied either the "cause and prejudice" or the "actual innocence" requirement of overcoming procedural bar.
>
> Simultaneous briefs shall be filed within 30 days of the date of this order.

(Appendix G)

Further briefing was had on the issues and oral argument was ordered and held. At the oral argument the court conceded that the retroactivity of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02) was not an issue since the Court had redefined the elements of federal crimes involving child pornography. The *Ashcroft* decision was, therefore, considered retroactively applicable to cases on collateral review. The court's concern was the quantity and nature of the evidence supporting "actual innocence" to support Mr. Cervini's gateway claim. First, counsel for Mr. Cervini referenced the verified exhibits and sworn statements submitted as part of the Section 2255 proceedings. Counsel also cited authority for the proposition that a demonstration of an absence of evidence in the record as to one of the elements of a crime can constitute evidence supporting a gateway claim of "actual innocence". Finally, counsel pointed out that no one had ever come forward with a shred of evidence that the image was anything but a so-called 'virtual image' which did not involve an actual minor.

At the Court of Appeals' direction, the argument then focused on the semantics of the plea colloquy. In particular, the question was presented to counsel whether the word "show / showed" (as used in the statement "show[ed] persons under the age of 18...") was more indicative that the "persons" were actual minors than if the word "depict" or "depicted" had been used in the plea colloquy. Counsel argued that "show" was generally equal to "depict", however one of the judges took issue with this and voiced his opinion that the word "show" used in the plea colloquy made it more likely that Mr. Cervini was stating that an actual minor was involved.

On 8-11-04, in a split opinion with a spirited dissent, the Court of Appeals affirmed the dismissal of Mr. Cervini's Section 2255 motion as procedurally barred without an evidentiary hearing and without reaching or deciding his

merit claim under *Ashcroft*. The two judge majority held that Mr. Cervini had not established "actual innocence".

In the dissenting opinion, Judge Holloway pointed out:

> The bar the majority requires Cervini to hurdle to overcome the procedural default in his case is to adduce evidence that would "convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt) . . . ." Majority Op. at 8. I agree. I am, however, unable to agree with the majority that Cervini has failed to clear this obstacle. [**21]
>
> The majority concludes that the evidence Cervini seeks to have introduced is insufficient, when considered in light of his plea colloquy, to establish a fair probability that "no reasonable juror would find him guilty beyond a reasonable doubt . . . ." Id. at 10. In reaching this conclusion, the majority concedes ignorance about what evidence Cervini seeks to have introduced. Indeed, the majority recognizes the unfairness of requiring Cervini to proffer what his expert will testify to given that he does not possess the images in question.
>
> Nonetheless, the majority boldly concludes that "no matter what an expert might now say," id. at 10, Cervini would be unable to convince a reasonable juror that the image in question is indeterminate. I disagree for three principal reasons: (1) at the time of his plea colloquy, it was irrelevant under the statute whether the images in question were of real or virtual children; (2) Cervini's vocation as a computer technician does not, ipso facto,

render Cervini an expert in computer photo manipulation; and (3) Cervini's plea colloquy produced a record here with the same ambiguity about the word "depict" that led to the Supreme Court's [**22] holding in *Free Speech Coalition*. See *United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir. 2003).

[*996] First, the probative value of Cervini's plea agreement in respect to whether the images in question were of real or virtual minors is of dubious value considering that at the time of the plea, that distinction was irrelevant. The admissions cited by the majority were made pursuant to Fed. R. Crim. P. 11, which requires a court to establish "a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). At the time of his plea on September 24, 2000, however, it was irrelevant whether the images he possessed were of real or virtual minors. Indeed, this court recently recognized that prior to the Supreme Court's decision in *Free Speech Coalition v. Ashcroft*, "this and other circuits had considered (and most had rejected) the argument that criminalization of virtual child pornography violated the First Amendment." *United States v. Harms*, 371 F.3d 1208, __ (10th Cir. 2004).

Thus, at the time Cervini pled guilty, a factual basis for his plea could have been established by either admitting [**23] the images were of actual or virtual minors. The ignorance of the parties involved in this plea as to the significance of the distinction between real and virtual child pornography is further reflected in the glaring absence of any specific inquiry by the sentencing court or the government as whether the images in question

were of actual minors. And, since Cervini's plea colloquy was never intended to answer the question of whether the images in question were real or virtual when entered into, it should not now.

Second, the majority's conclusion that Cervini's vocation as a computer technician would make him able to know the difference between real and virtual minors is without support. While the record reveals Cervini worked as a computer technician, the record does not indicate that he had any specific training or job experience on computer photo manipulation. App. of Exhibits I at A10-11. To assume, as does the majority, that this familiarity with computers would grant Cervini the ability to distinguish between real and virtual children would be akin to assuming that a criminal defense attorney's general familiarity with the law would enable him to design a perpetual charitable [**24] trust. Moreover, the very essence of Cervini's petition is that it is impossible to tell whether the images he possessed were real or virtual. Thus, the record does not support the majority's implication that if the images were in fact virtual, Cervini would have stated so during his colloquy.

Finally, Cervini's plea agreement in this case does not materially differ from the record we held inadequate to sustain a conviction for possession of child pornography in *Pearl*, 324 F.3d at 1214. In *Pearl*, the defendant admitted the images he possessed "depicted minors engaged in sexually explicit conduct." *Id.* Nonetheless, we held that admission was insufficient to

sustain the defendant's conviction because of the "the ambiguity in the word 'depict.'" *Id.* (quotation marks in original).

In the instant case, Cervini admitted that the images he possessed "showed persons under the age of 18 engaged in sexually explicit conduct" and that they contained "visual depictions involving the use of minors engaging in sexually explicit conduct . . . ." Appendix of Exhibits II at M4. On the basis of these admissions, the majority concludes that Cervini admitted "actual [**25] minors were used." Majority Op. at 10 (emphasis added). However, nowhere in the plea colloquy are the words "actual minor" used. Instead, the only difference between the plea colloquy in this case and the record in *Pearl* is the use of the word "show" instead of "depict." And, while legal scholars can debate the difference between those two words, I do [*997] not believe the difference to be significant enough, when uttered by a layman, to hold that one, but not the other, implicates virtual minors.

Given the ambiguity in Cervini's plea colloquy as to whether the images he possessed were of real rather than virtual minors, and the similarity of the colloquy in this case and the record in Pearl, I cannot conclude that "no matter what an expert might now say," Majority Op. at 10, it would be impossible to "convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt)." Accordingly, I respectfully dissent.

United States v. Cervini, 379 F.3d 987, 995-997; 2004 U.S. App. LEXIS 16543 (10th Cir. 8-12-04) (Holloway, J., dissenting) (Appendix A)

A petition for rehearing was timely filed by Mr. Cervini. This petition was denied by the Court of Appeals without opinion on 9-22-04. (Appendix C)

Mr. Cervini demonstrates within that this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to the showing necessary to demonstrate "actual innocence" after a plea of guilty when the reach of the statutory violation to which the defendant pleaded is subsequently narrowed by this Court.

REASONS FOR GRANTING THE WRIT

1.) **THIS COURT SHOULD GRANT MR. CERVINI'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO THE SHOWING NECESSARY TO DEMONSTRATE "ACTUAL INNOCENCE" AFTER A PLEA OF GUILTY WHEN THE REACH OF THE STATUTORY VIOLATION TO WHICH THE DEFENDANT PLEADED IS SUBSEQUENTLY NARROWED BY THIS COURT.**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last

> resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision... *Id.*

Supreme Court Rule 10(a).

1A.) The Circuit Courts, As Well As The Judges Of The Tenth Circuit, Are Divided By The Weight To Be Granted To A Defendant's Use Of Words For Which The Meaning Has Been Changed By Supreme Court Decisions When Determining Whether The Defendant Can Demonstrate "Actual Innocence".

In Mr. Cervini's case, as set forth above, the Court of Appeals held that he had not demonstrated actual innocence in his 'gateway claim' within the meaning of *Schlup v. Delo*, 513 U.S. 298; 115 S. Ct. 851; 1995 U.S. LEXIS 701; 130 L. Ed. 2d 808 (1995) and was not, therefore, entitled to a ruling on his First Amendment 'merit claim' claim based primarily on his one-word, affirmative response in his plea colloquy when questioned whether the image "show[ed] persons under the age of 18 engaged in sexually explicit conduct". It is and was undisputed that the question whether the image showed an "actual minor" never came up and the phrase "actual minor" never even appeared in the plea proceedings. It is and was undisputed that the government has never argued, much less presented evidence that an "actual minor" was utilized in the creation of the image. It never got to that point. At the time of the plea and direct appeal, it was irrelevant whether an "actual minor" had been used. In the section 2255 proceedings, the government simply took the position from

the beginning that Mr. Cervini's 'admission' in the plea colloquy precluded the possibility that Mr. Cervini could ever demonstrate "actual innocence". (Statement of the Case, supra) (See Appendix A, B, D)

While the majority in Court of Appeals held that Mr. Cervini's knowledge of computers should have enabled him to present additional evidence that the image in question was 'virtual' instead of an actual minor, the fact remains that the decision turned on the splitting of hairs as to whether the word "show / showed" (as used in the statement "show[ed] persons under the age of 18...") was more indicative that the "persons" were actual minors than if the word "depict" or "depicted" had been used in the plea colloquy. *United States v. Cervini*, 379 F.3d 987, 995-997; 2004 U.S. App. LEXIS 16543 (10th Cir. 8-12-04) (Holloway, J., dissenting)

Two judges said that Mr. Cervini somehow sufficiently admitted that an actual minor had been used in creation of the image. The other judge said any admission was rendered sufficiently equivocal in light of this Court's *Ashcroft* decision that the statement should not have been used to deny Mr. Cervini a decision on the merits of his First Amendment claim. *Id.*

The majority's holding in this case directly conflicts with the following decisions of the Fifth, Sixth, Ninth, and Eleventh circuits: *United States v. Sanders*, 157 F.3d 302; 1998 U.S. App. LEXIS 25452 (5th Cir. 1998) (fact that defendant "pleaded guilty to an indictment stating that he 'did knowingly...carry and use a firearm'" insufficient to preclude claim of actual innocence of carry and use of a firearm when meaning of word "use" subsequently changed by Supreme Court decision); *United States v. Waucaush*, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 (6th Cir. 2004) (defendant "may be actually innocent" of activity affecting interstate commerce "even though he admitted as part of his plea that his activities "affected interstate commerce"); *United States v. Benboe*, 157 F.3d 1181; 1998 U.S. App. LEXIS 24417 (9th Cir. 1998) (statement in plea agreement

"that he had a marijuana grow operation in his home and maintained a loaded firearm which he carried and/or used in relation to the marijuana grow and marijuana conspiracy" together with statement in plea colloquy "that he was involved in the distribution of marijuana and that he had 'possession of the firearm in the use of the drug transaction'" and evidence that gun was found in room where narcotics transaction took place, was insufficient to preclude actual innocence of "use" of firearm in Drug Trafficking Crime, where Supreme Court changed meaning of word "use" after plea); *United States v. Montano*, 381 F.3d 1265; 2004 U.S. App. LEXIS 18159 (11th Cir. 200) (plea of guilty to "use of a firearm during and in relation to ... drug trafficking crime" did not preclude actual innocence when Supreme Court changed meaning of word "use" after plea). *Cf. United States v. Boyd*, 312 F.3d 213; 2002 U.S. App. LEXIS 24483 (6th Cir. 2002) (acquiescence "that the material he tried to send was 'pornographic child pornography,'" was "no more than a conclusory description of the nature of the material in question, rather than evidence").

The decisions of the foregoing Courts of Appeals have unequivocally determined, contrary to the decision of the Tenth Circuit, that it is fundamentally unfair to categorically preclude a criminal defendant from obtaining review of the merits of a habeas claim based on a plea colloquy which included a word for which the meaning had subsequently changed.

The split in the circuits is clear cut and the opposing positions are hardening instead of harmonizing.

This Court has never resolved this question which divides the Courts of Appeals and, as is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95

L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (1984); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

1B.) The plea colloquy in Petitioner's case failed to unequivocally establish, or even establish by a preponderance of the evidence, that an "actual minor" was used in creation of the single digital image posted on the internet; as such, the colloquy should not have been used to defeat Petitioner's claim of "actual innocence" And, Thereby, defeat His Entitlement to a ruling on his "merit claim" of violation of his First Amendment rights.

As set forth in the statement of the case, supra, Mr. Cervini pleaded in his Section 2255 motion, demonstrated, and it was undisputed, that the record was completely devoid of any evidence (other than his ambiguous acquiescence) that an actual minor had been used to generate the image. Moreover, Mr. Cervini submitted competent evidence demonstrating that it was virtually impossible to distinguish a virtual image from an image of an actual minor. As further set forth above, at the time of the plea proceedings and direct appeal it was completely irrelevant whether the image showed or depicted either an actual minor or a computer generated virtual image or a computer modified image of an adult that looked like a person under the age of 18.

In spite of the foregoing, the District Court and two of the three judges of the Court of Appeals held that Mr. Cervini

was precluded from demonstrating that he was actually innocent of the charge of possession of child pornography based on the fact that he had answered "yes" when questioned by the prosecutor whether the image "show[ed] persons under the age of 18 engaged in sexually explicit activity".

To the extent that the Court of Appeals majority held that Mr. Cervini had not demonstrated by a preponderance of evidence that he was actually innocent, the court's decision is contrary to the holdings of other courts that have considered the same question under analogous circumstances. *United States v. Sanders*, 157 F.3d 302; 1998 U.S. App. LEXIS 25452 (5th Cir. 1998); *United States v. Waucaush*, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 (6th Cir. 2004); *United States v. Benboe*, 157 F.3d 1181; 1998 U.S. App. LEXIS 24417 (9th Cir. 1998); *United States v. Montano*, 381 F.3d 1265; 2004 U.S. App. LEXIS 18159 (11th Cir. 200). The Courts understandably do not grant much if any weight to a defendant's words when a Supreme Court decision subsequently changes the meaning of those words.

As the Court of Appeals in *United States v. Waucaush*, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 (6th Cir. 2004) pointed out in holding that a defendant had established he was "actually innocent" of activity affecting interstate commerce "even though he admitted as part of his plea that his activities "affected interstate commerce":

> ... Contrary to the positions of the Government and the district court, Waucaush may be actually innocent even though he admitted as part of his plea that his activities [*7] "affected interstate commerce." To illustrate: imagine that Waucaush had admitted to stealing apples from the Post Office, was advised by his counsel and the court that apples were vegetables, and pled guilty to "stealing vegetables from a federal building." If the Supreme Court later held that,

> as a matter of law, apples were not vegetables, Waucaush would be actually innocent of "stealing vegetables." Just as Waucaush's misinformed admission of a legal conclusion would not have turned apples into vegetables, his guilty plea in today's case could not have created an effect on commerce that the law did not otherwise recognize.

United States v. Waucaush, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 **6-7 (6th Cir. 2004)

The Tenth Circuit decision in *Cervini* is not only contrary to the decisions of the Fifth, Sixth, Ninth, and Eleventh circuits but is directly contrary to this Court's decision in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998) where the Court held that a plea to using firearms in relation to a drug trafficking crime, in violation of 18 USCS 924(c)(1) did not categorically preclude a defendant from demonstrating actual innocence of using firearms).

To the extent that the Court of Appeals was divided as to whether Mr. Cervini's statement was somehow specific that an actual minor had been used in generating the image, this should have supported Mr. Cervini's claim of entitlement to the actual innocence exception. When judges can't agree on a 'verdict', a jury of laymen could very well disagree and/or find the defendant not guilty. Moreover, when judges can't agree on the legal effect of words in a plea colloquy, it's difficult to understand how the words should bind a lay defendant, especially when the meaning of the words subsequently changed. Finally, the both the Court of Appeals and the prosecutor are of the opinion that all that would be necessary on a remand is for the finder of fact to review the image to provide evidence whether the image is of an actual minor. Since the image has never been made part of the record and since it seems like a such a simple procedure, it's difficult to understand why Mr. Cervini shouldn't be given

his day in court for a ruling on the merits of his First Amendment claim.

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Tenth Circuit in Mr. Cervini's case.

CONCLUSION

For all of the foregoing reasons, Petitioner Michael Cervini respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming the District Court dismissal of his motion pursuant to 28 U.S.C. § 2255 without reaching the merits and **REMAND** to the court of appeals for reconsideration in light of *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998).

Brian C. Southwell
Attorney for Michael Cervini
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

Date: _____

No.

Supreme Court of the United States

MICHAEL CERVINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Michael Cervini and submits the attached appendix pursuant to Supreme Court Rules.

Brian C. Southwell
Attorney for Michael Cervini
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

Date: _____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DATED 8-11-04

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICHAEL ALBERT CERVINI,
Defendant-Appellant.
No. 03-6144
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
379 F.3d 987; 2004 U.S. App. LEXIS 16543
August 11, 2004, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. (D.C. Nos. 02-CV-596-L and 99-CR-206-L). United States v. Cervini, 16 Fed. Appx. 865, 2001 U.S. App. LEXIS 17105 (2001)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner appealed from an order of the United States District Court for the Western District of Oklahoma, that denied his motion, pursuant to 28 U.S.C.S. § 2255, to vacate his guilty plea to and sentence for possession of child pornography that was transported in interstate commerce by means of a computer, 18 U.S.C.S. § 2252A(a)(5)(B). He argued actual innocence based on a recent U.S. Supreme Court opinion.

OVERVIEW: Petitioner filed his post-trial relief motion in district court seeking to have his conviction vacated on the basis that the Free Speech Coalition decision applied retroactively to his petition, as it rendered his guilty plea unknowing and involuntary. That case distinguished "virtual" child pornography that was computer generated by the technique of morphing, which did not depict actual images of actual minor children engaged in pornography. The issue was whether, when contrasted with the corresponding evidence of guilt, evidence that some of the pornography

might have been virtual was enough to convince the court that no reasonable juror would have voted to convict petitioner. Because petitioner had admitted on the record in the plea agreement that his computer contained visual depictions involving the use of minors engaging in sexually explicit conduct. None of his proffered evidence would directly contradict his apparent admissions in the plea colloquy. A majority of the panel thus found that the standard for actual innocence could not be met.

OUTCOME: The judgment of the district court was affirmed.

COUNSEL: Randal A. Sengel, Assistant United States Attorney (and Robert G. McCampbell, United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Brian C. Southwell, Minneapolis, Minnesota, for Defendant-Appellant.

JUDGES: Before KELLY, HOLLOWAY, and McCONNELL, Circuit Judges. HOLLOWAY, Circuit Judge, dissenting.

OPINION BY: KELLY

OPINION:

[*989] KELLY, Circuit Judge.

Defendant-Appellant Michael Cervini appeals from the district court's denial of his motion to vacate, 28 U.S.C. § 2255. Our jurisdiction arises under 28 U.S.C. § 2253(a) and, for the reasons stated below, we affirm.

Background

In December 1999, Defendant was charged in a two-count indictment with (1) shipping child pornography in interstate commerce, 18 U.S.C. § 2252A(a)(1); and (2) possession of child pornography that was transported in interstate commerce by means of a computer, 18 U.S.C. § 2252A(a)(5)(B). Aplt. App. at C2. Pursuant to a conditional plea agreement [**2] Defendant pled guilty in district court

to the second count of the indictment and was sentenced to twenty-seven months imprisonment and three years supervised release. n1 Id. The first count was dismissed. On appeal, he argued that the district court erred in denying his motion to suppress and his request for an evidentiary hearing on that motion. *United States v. Cervini*, 16 Fed. Appx. 865, 2001 WL 863559 (10th Cir. 2001). We affirmed on both grounds.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Despite the fact that Defendant had served his prison sentence at the time he filed the instant petition, he was still on supervised release and therefore remained "in custody" for that offense, thus rendering him eligible to file the instant motion. See *Oyler v. Allenbrand*, 23 F.3d 292, 293-94 (10th Cir. 1992).

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Following Defendant's appeal, the Supreme Court issued its decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 152 L. Ed. 2d 403, 122 [*990] S. Ct. 1389 (2002), which invalidated § 2256(8)(B) and (D) of the [**3] Child Pornography Prevention Act (CPPA), 18 U.S.C. § 2251 et. seq. These provisions purported to include in the definition of child pornography images created without the use of actual children. n2 Finding that the prohibition of such "virtual" child pornography chilled protected adult-to-adult speech, the Court held that such prohibitions violated the First Amendment. See Free Speech Coalition, 535 U.S. at 255.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Generally referred to as "virtual" child pornography, such images can be created by using adults made to appear to be minors, or through the use of a computer technology known as "morphing," whereby innocent images of actual minors are altered to make it appear that the minors are engaged in sexually explicit behavior. See *Free Speech Coalition*, 535 U.S. at 241-42.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In May 2002, Defendant filed a § 2255 motion in district court seeking to have his conviction vacated on the basis that the Free Speech Coalition decision should be applied [**4] to his petition retroactively, and arguing that Free Speech Coalition renders his guilty plea unknowing and involuntary. See Aplt. App. at O18; *United States v. Gigley*, 213 F.3d 509, 516 (10th Cir. 2000) ("A guilty plea is void if it is not knowing and voluntary."). The district court refused to reach the merits of Defendant's claims, finding that Defendant had not made a sufficient showing to overcome the procedural bar precluding a court in a § 2255 action from reaching the merits of otherwise defaulted claims. Aplt. App. at P1-10; see *United States v. Frady*, 456 U.S. 152, 167-68, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982). In response to Defendant's application to this court, we granted a certificate of appealability (COA) on the twin questions of (1) whether Defendant has made a sufficient showing of actual innocence to overcome the procedural bar against consideration of defaulted claims, and (2) whether the Court's decision in Free Speech Coalition is retroactively applicable to petitions for collateral relief.

Discussion

When reviewing a district court's denial of a § 2255 motion, we review the district court's legal conclusions de novo. *United States v. Horey*, 333 F.3d 1185, 1187 (10th Cir. 2003). [**5] We review the district court's findings of fact for clear error. *United States v. Salazar*, 323 F.3d 852, 855 (10th Cir. 2003).

A § 2255 motion is not intended as a substitute for an appeal. See *Frady* 456 U.S. at 164-65. Consequently "failure to raise an issue either at trial or on direct appeal imposes a procedural bar to habeas review." *United States v. Barajas-Diaz*, 313 F.3d 1242, 1245 (10th Cir. 2002); see also *Bousley v. United States*, 523 U.S. 614, 622, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). There are, however, two well recognized exceptions under which a defendant may escape application of the procedural bar against consideration of defaulted

claims. First, if defendant can show both good cause for failing to raise the issue earlier, and that the court's failure to consider the claim would result in actual prejudice to his defense, the procedural bar will not be applied. See *Frady*, 456 U.S. at 167. Alternatively, because a writ of habeas corpus is "at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), if defendant can demonstrate that "failure to [**6] consider the federal claims will result in a fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (internal quotation marks and citations [*991] omitted), the court may reach the merits of the claimed constitutional deficiencies despite the procedural bar.

As both the Supreme Court and this court have recognized, the incarceration of one actually innocent of the crime of which he has been convicted constitutes a grave miscarriage of justice; it is equally well established that if a defendant can adduce new evidence in post-conviction proceedings showing that "constitutional error 'probably' resulted in the conviction of one who was actually innocent," Schlup, 513 U.S. at 322; see also *United States v. Wiseman*, 297 F.3d 975, 979 (10th Cir. 2002), the court may reach the merits of otherwise defaulted claims. In order to meet this standard, however, "the petitioner [is] required to establish, by a fair probability, that the trier of facts would have entertained a reasonable doubt of his guilt." Schlup, 513 U.S. at 322 (internal quotations and citations omitted).

Defendant [**7] pled guilty, he did not raise his claims of constitutional error at trial, nor did he do so on direct appeal from his sentence. His claims, therefore, are subject in the first instance to a procedural bar. In an attempt to overcome the procedural bar and allow this court to reach the merits of his claims, Defendant alleges that he is actually innocent of the crime to which he pled guilty. Specifically, Defendant claims that in light of the Supreme Court's decision in *Free Speech Coalition*, no reasonable juror would

have found him guilty of possession of actual child pornography, as it would have been impossible to tell whether the images he was convicted of possessing were of actual or virtual child pornography. See Aplt. Br. at 51-53; Aplt. App. O18-O19, O21.

Though conceptually distinct from a sufficiency of the evidence claim, an actual innocence claim must be viewed in light of the reasonable doubt standard:

The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of "innocence." The *Carrier [Murray v. Carrier*, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)] standard reflects the proposition, firmly [**8] established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt. See *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Indeed, even in *Sawyer [Sawyer v. Whitley*, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)], with its emphasis on eligibility for the death penalty, the Court did not stray from the understanding that the eligibility determination must be made with reference to reasonable doubt. Thus, whether a court is assessing eligibility for the death penalty under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence.

Schlup, 513 U.S. at 328. There must be a showing "that no reasonable juror would have found the defendant guilty." Id. at 329. This requires "a probabilistic determination about what reasonable, properly instructed jurors would do." Id. Ultimately, actual innocence is not an easy showing to make:

To be credible, such a claim requires [**9] petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical

physical evidence-that was not presented at trial. Because such evidence is obviously unavailable [*992] in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324; see also *Calderon v. Thompson*, 523 U.S. 538, 559, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998).

In deciding whether an evidentiary hearing is appropriate, *Schlup* instructs that a district court "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." 513 U.S. at 331. Thus, a movant must identify evidence that demonstrates that he probably would not have been found guilty beyond a reasonable doubt by any reasonable juror. This requirement of identifying evidence on which an actual innocence claim will rest is essential. The actual innocence exception is grounded in the need "to balance the societal interests in finality, comity and conservation of scarce judicial resources with the individual interest in justice [**10] that arises in the extraordinary case." Id. at 324 (emphasis added). It is precisely the requirement that a movant adduce new reliable evidence that insures that the actual innocence exception does not swallow the procedural bar rule.

Defendant contends that he is actually innocent because it is impossible to tell beyond a reasonable doubt whether the images in this case "were actual identifiable minor children" or "simply computer generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors." Aplt. Br. at 52 n.15. We will assume in theory that if a movant really could produce evidence that would convince a reasonable juror that the image in question is indeterminate (such that it not possible to conclude that the image is actual beyond a reasonable doubt), a movant would be actually innocent.

In support of his assertions, Defendant included a transcript of Congressional testimony by the President of the

National Center for Missing and Exploited Children condemning the process of creating virtual images indistinguishable from actual images, and a copy [**11] of a software advertisement (apparently from the internet) demonstrating the technique of morphing. Id. at n.16. Defendant also indicated that he would like to call an expert of counsel's choosing to support his theory. n3 Aplt. App. O23.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 We do not overlook that in his § 2255 motion, Defendant listed several witnesses he would call, including himself, defense counsel, the special agent that procured the search warrant which led to the discovery of the images, a representative of an internet service provider that responded to a government subpoena and identified Defendant, and a paralegal who supplied an affidavit in support of Defendant's theory that defense counsel was ineffective for failing to adequately investigate and present his motion to suppress. See Aplt. App. O22, D4-D14, F2, & I1-I5. Most, if not all, of this evidence pertains to Defendant's claim of ineffectiveness based upon counsel's unsuccessful motion to suppress. The district court rejected this claim and we did not grant a COA on it.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[**12] Certainly, such evidence has some probative value as to Mr. Cervini's innocence. The question is whether, when contrasted with the corresponding evidence of guilt, such evidence is powerful enough to convince a court that no reasonable juror would have voted to convict. We think it is not. Consistent with *Schlup*, we must view this showing or proffer against the proceedings that led to Defendant's conviction. See also *Blackledge v. Allison*, 431 U.S. 63, 72-74, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) (comparing the petitioner's allegations against the record in deciding whether to have an evidentiary hearing). In other words, in considering Mr. Cervini's claim of actual innocence we must [*993] consider what reasonable jurors would do had they

been aware of both the original evidence of guilt as well as the newly presented, and presumably exculpatory, evidence.

Defendant worked as a computer technician at a university and was familiar with computers. Aplt. App. O11. The plea colloquy reflects the following:

> Q: As to Count Two of the indictment, on or about September 7, 1999, in Weatherford, Oklahoma did you knowingly possess images of child pornography that were contained on [**13] your computer?
>
> A: Yes, I did.
>
> Q: Did the images show persons under the age of 18 engaged in sexually explicit conduct?
>
> A: Yes

Aplt. App. at N14-15; accord Aplee. Br. at 8-10 (Plea Agreement and Petition to Enter Guilty Plea). He also admitted in the plea agreement that his computer "contained visual depictions involving the use of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252A." Aplt. App. M4 (emphasis added).

While the statement in the plea colloquy might not be conclusive, see *United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir. 2003), Defendant's admission in the plea agreement is quite specific that actual minors were used; not indistinguishable images. In the face of this admission, it simply is not probable that no reasonable juror would find him guilty beyond a reasonable doubt-no matter what an expert might now say. n4 At oral argument, counsel clearly stated that Defendant is not contending that the images were virtual, but only that it is difficult to tell the difference. This means that none of his proffered evidence will directly contradict his apparent admissions [**14] in the plea colloquy. These factors are not decisive, but they are part of the overall picture to which we must look in determining what any rational juror would probably do.

---------- Footnotes ----------

n4 We note that under *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003), a jury is entitled to reach the conclusion, based on the image alone and without expert evidence, that the image is actual.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

We also must consider Defendant's failure to say anything in his proffer about his own knowledge of the provenance of the image. Especially in light of his computer expertise, if this image came from a source that plausibly could have been virtual, Defendant would be in a position to know that. He has not claimed, for example, that he utilized software that allowed images to be manipulated or obtained these or others from such a source. He also would know the rough ages of the pictured children, which would bear on the likelihood that they were morphed images of adults. Similarly, if the image's appearance was atypical [**15] in a way that suggested on its face that it was virtual (for instance, if it seemed at all unlifelike or blurry), Defendant could have so averred. In sum, the images were purportedly of actual children, and there are no facts alleged that would probably would prevent any reasonable juror from finding, beyond a reasonable doubt, that the images were exactly what they purported to be.

The vague character of Defendant's proffer regarding what his witnesses, including an expert, would actually say, about this claim does not favor an evidentiary hearing. Of course, we cannot require too much specificity about what the expert would conclude about images Defendant doesn't have, but Defendant could at least indicate what kinds of methods [*994] the expert would use in order to evaluate whether the images could have been computer-generated. n5 District courts are entitled to some latitude with regard to evidentiary hearings, and the standard is higher than notice pleading. See *Schlup*, 513 U.S. at 332 (noting that in the context of an evidentiary hearing request, the court may consider "how the timing of the submission and the likely credibility of the affiants bear on the probable [**16]

reliability of that evidence"). District courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 In his § 2255 motion, Defendant moved for discovery of the images. See Rule 6(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts. He does not challenge the district court's apparent denial of that motion. Arguments not raised by the parties in their briefs are deemed waived. See *Hooks v. Ward*, 184 F.3d 1206, 1233 n.25 (10th Cir. 1999)

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Because we find that Defendant has not made a showing of actual innocence sufficient to overcome the procedural bar against consideration of defaulted claims, we decline to reach the merits issue of whether Free Speech Coalition is retroactively applicable to cases on collateral attack.

The dissent contends that the plea colloquy is of virtually no probative value because the legal significance of a distinction [**17] between actual and virtual images was irrelevant at the time it occurred. We have never held that factual admissions made during the plea process may not be considered unless a Defendant appreciated fully the legal significance of those admissions. The oath is not so conditional. We may consider the plea colloquy in light of the plea agreement. Although the dissent recognizes, as it must, that Mr. Cervini in his plea agreement admitted that the images involved the use of minors engaging in sexually explicit conduct, the dissent would completely discount such an admission because the plea colloquy does not contain the words "actual minor." The ordinary and reasonable meaning of the admission in the plea agreement is that the images involved the "use" of real minors. The dissent's approach is at odds with Schlup, which instructs that in assessing claims of actual innocence, we must look at all the evidence in

probabilistic fashion. 513 U.S. at 328, 330; see also *Phillips v. Ferguson*, 182 F.3d 769, 774-75 (10th Cir. 1999) (in assessing actual innocence, court considered evidence of defendant's involvement in the crime). Defendant's admission that [**18] the images involved the use of minors engaging in sexually explicit activity, even in light of his new evidence that it is difficult to tell whether some images are virtual or actual, undermines his actual innocence claim that he probably would not be found guilty beyond a reasonable doubt by any reasonable juror. *Schlup*, 513 U.S. at 329; see also *Bousley*, 523 U.S. at 624 (recognizing factual nature of an actual innocence claim even given an intervening Supreme Court decision).

The dissent is simply wrong when it claims that the only difference between this case and *Pearl* lies in the words "depict" used in *Pearl*, 324 F.3d at 1214, and "show" used in the plea colloquy in this case. In Pearl, this court considered the defendant's admission that the images in question depicted minors engaged in sexually explicit conduct. In response to the Pearl dissent's desire to affirm regardless of the legal error contained in the jury instructions, this court remarked that such an admission did not require affirmance of the convictions because the word "depict" [*995] is what led to the holding in *Free Speech Coalition*. Id. In Pearl [**19] , the defendant contested his guilt, went to trial and preserved this issue in a challenge to the indictment which this court viewed as extending to the jury instructions. In this case, the Defendant did not raise the issue, instead pleading guilty and in the process admitting that the images not only showed minors engaging in sexually explicit activity, but also involved the use of minors engaging in sexually explicit conduct in violation of the statute.

Finally, the dissent ascribes far too much significance to our observation about Defendant's computer expertise. While the dissent would require that Defendant have specialized training or job experience in computer photo manipulation before considering this factor, we do not.

Defendant had access to over 100 computers and he worked on computers on a regular basis both as a university library computer technician and as a student. Aplt. App. O-13. More importantly, he posted two images of child pornography to an internet news group. Given his background, it is entirely reasonable to require him to state a factual basis for his suspicion that it is impossible to tell whether the images are virtual or actual-by discussing the [**20] source of the images, the ages of the pictured children, or why the posted image itself n6 would be easily subject to manipulation.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n6 The posted image was described in the affidavit for the search warrant and the presentence report as "an unknown minor female's exposed genitals. The unknown minor's legs are spread and the image is centered on the genitals." Aplt. App. D-10; see also Aplt. Supp. App. A-4.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

For the foregoing reasons, the judgment of the district court denying Defendant's § 2255 motion is

AFFIRMED.

DISSENTBY: HOLLOWAY

DISSENT:

HOLLOWAY, Circuit Judge, dissenting:

The bar the majority requires Cervini to hurdle to overcome the procedural default in his case is to adduce evidence that would "convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt) . . . ." Majority Op. at 8. I agree. I am, however, unable to agree with the majority that Cervini has failed to clear this obstacle. [**21]

The majority concludes that the evidence Cervini seeks to have introduced is insufficient, when considered in light of his plea colloquy, to establish a fair probability that "no reasonable juror would find him guilty beyond a reasonable doubt . . . ." Id. at 10. In reaching this conclusion,

the majority concedes ignorance about what evidence Cervini seeks to have introduced. Indeed, the majority recognizes the unfairness of requiring Cervini to proffer what his expert will testify to given that he does not possess the images in question.

Nonetheless, the majority boldly concludes that "no matter what an expert might now say," id. at 10, Cervini would be unable to convince a reasonable juror that the image in question is indeterminate. I disagree for three principal reasons: (1) at the time of his plea colloquy, it was irrelevant under the statute whether the images in question were of real or virtual children; (2) Cervini's vocation as a computer technician does not, ipso facto, render Cervini an expert in computer photo manipulation; and (3) Cervini's plea colloquy produced a record here with the same ambiguity about the word "depict" that led to the Supreme Court's [**22] holding in *Free Speech Coalition*. See *United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir. 2003).

[*996] First, the probative value of Cervini's plea agreement in respect to whether the images in question were of real or virtual minors is of dubious value considering that at the time of the plea, that distinction was irrelevant. The admissions cited by the majority were made pursuant to Fed. R. Crim. P. 11, which requires a court to establish "a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). At the time of his plea on September 24, 2000, however, it was irrelevant whether the images he possessed were of real or virtual minors. Indeed, this court recently recognized that prior to the Supreme Court's decision in *Free Speech Coalition v. Ashcroft*, "this and other circuits had considered (and most had rejected) the argument that criminalization of virtual child pornography violated the First Amendment." *United States v. Harms*, 371 F.3d 1208, __ (10th Cir. 2004).

Thus, at the time Cervini pled guilty, a factual basis for his plea could have been established by either admitting [**23] the images were of actual or virtual minors. The ignorance of the parties involved in this plea as to the

significance of the distinction between real and virtual child pornography is further reflected in the glaring absence of any specific inquiry by the sentencing court or the government as whether the images in question were of actual minors. And, since Cervini's plea colloquy was never intended to answer the question of whether the images in question were real or virtual when entered into, it should not now.

Second, the majority's conclusion that Cervini's vocation as a computer technician would make him able to know the difference between real and virtual minors is without support. While the record reveals Cervini worked as a computer technician, the record does not indicate that he had any specific training or job experience on computer photo manipulation. App. of Exhibits I at A10-11. To assume, as does the majority, that this familiarity with computers would grant Cervini the ability to distinguish between real and virtual children would be akin to assuming that a criminal defense attorney's general familiarity with the law would enable him to design a perpetual charitable [**24] trust. Moreover, the very essence of Cervini's petition is that it is impossible to tell whether the images he possessed were real or virtual. Thus, the record does not support the majority's implication that if the images were in fact virtual, Cervini would have stated so during his colloquy.

Finally, Cervini's plea agreement in this case does not materially differ from the record we held inadequate to sustain a conviction for possession of child pornography in *Pearl*, 324 F.3d at 1214. In *Pearl*, the defendant admitted the images he possessed "depicted minors engaged in sexually explicit conduct." Id. Nonetheless, we held that admission was insufficient to sustain the defendant's conviction because of the "the ambiguity in the word 'depict.'" Id. (quotation marks in original).

In the instant case, Cervini admitted that the images he possessed "showed persons under the age of 18 engaged in sexually explicit conduct" and that they contained "visual depictions involving the use of minors engaging in sexually

explicit conduct . . . ." Appendix of Exhibits II at M4. On the basis of these admissions, the majority concludes that Cervini admitted "actual [**25] minors were used." Majority Op. at 10 (emphasis added). However, nowhere in the plea colloquy are the words "actual minor" used. Instead, the only difference between the plea colloquy in this case and the record in Pearl is the use of the word "show" instead of "depict." And, while legal scholars can debate the difference between those two words, I do [*997] not believe the difference to be significant enough, when uttered by a layman, to hold that one, but not the other, implicates virtual minors.

Given the ambiguity in Cervini's plea colloquy as to whether the images he possessed were of real rather than virtual minors, and the similarity of the colloquy in this case and the record in Pearl, I cannot conclude that "no matter what an expert might now say," Majority Op. at 10, it would be impossible to "convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt)." Accordingly, I respectfully dissent.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA ENTERED 9-29-00

ENTERED SEPTEMBER 29, 2000
UNITED STATES DISTRICT COURT
WESTHERN DISTRICT OF OKLAHOMA

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
MICHAEL ALBERT CERVINI

Case Number: CR-99-00206-001-L
Defendant's Attorney: Mack Martin

THE DEFENDANT:
[x] pleaded guilty to count two of the indictment on September 26, 2000
[] pleaded nolo contendere to count(s)_____
[] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section: 18 U.S.C. §2252A(a)(5)(B)
Nature of Offense: Knowingly possessing materials depicting images of child pornography
Date Offense Concluded: 09/07/1999
Count Number(s): two
The defendant is sentenced as provided in pages 2 through 7 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
[] The defendant has been found not guilty on count(s)_____
[x] Count one of the indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of

any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: XXX-XX-1554
Defendant's Date of Birth: 10/31/1956
Date of imposition of Judgement: September 26, 2000
Defendant's USM No.: 14508-064
Defendant's Residence Address: Oklahoma County Jail, 201 North Shartel, Oklahoma City, OK 73102
Defendant's Mailing Address: 185 South Circle Drive, Weatherford, OK 73096

Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
TIM LEONARD, U.S. DISTRICT JUDGE
Date
SEP 29 2000

IMPRISONMENT
The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 27 months.

[] The Court makes the following recommendations to the Bureau of Prisons:
That defendant be incarcerated at El Reno Camp, El Reno, Oklahoma.
[x] The defendant is remanded to the custody of the United States Marshal.
[ ] The defendant shall surrender to the United States Marshal for this district
[ ] at _____ on _____
as notified by the United States Marshal.
[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN
I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE
Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the

probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;

7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

ADDITIONAL SUPERVISED RELEASE TERMS

[x] shall submit to a sex offender mental health assessment and a program of sex offender mental health treatment, as directed by the probation officer, until such time as you are released from the program by the probation officer. This assessment and treatment may include the plethysmography and polygraph to assist in planning and case monitoring. Any refusal to submit to such assessment or tests as scheduled is a violation of the conditions of supervision.

[x] shall waive all rights to confidentiality regarding sex offender mental health treatment in order to allow release of information to the supervising probation officer and to authorize open communication between the probation officer and the treatment provider.

[x] shall not be at any residence where children under the age of 18 are residing without the prior written permission of the probation officer.

[x] shall not be associated with children under the age of 18 except in the presence of a responsible adult who is aware of your background and current offense, and who has been approved by the probation office.

[x] shall be prohibited from places where minor children under the age of 18 congregate, such as residences, parks, playgrounds and schools.

[x] shall neither use any form of pornography or erotica nor enter any establishment where pornography or erotica can be obtained or viewed. You shall not possess or have under your control any matter that alludes to sexual activity of minors, or depicts sexual activity by or between minors under the age of 18.

[x] shall comply with any applicable sex offender registration statute (Megan's Law), state or federal, in effect at the time of release from incarceration for any jurisdiction in which you may reside.

[x] shall not possess or use a computer for the duration of supervised release without written permission of the U.S. Probation Officer. You shall not use a computer with access to any on-line computer service at any location (including employment) without the approval of the probation officer. This includes any Internet provider, bulletin board system, or

any other public or private computer network. Any approval by the probation officer may constitute additional restrictions, set by the probation officer. Additionally, you shall consent to third party disclosure to any employer or potential employer, concerning your computer-related restrictions.

[x] shall provide all personal/business telephone records to the probation officer upon request. Further, you shall provide the probation officer written authorization to request a record of all your outgoing or incoming calls from any telephone service provider.

[x] shall provide the probation officer with any requested financial information to verify that there have been no payments to an Internet server or entities that provide access to the Internet.

[x] shall submit your person, residence, office or vehicle to search conducted by the probation officer at a reasonable time and in a reasonable manner to determine if you are in compliance with the conditions of supervision which prohibits your possession of a computer and pornographic materials. Such search may be conducted by the probation officer without prior notice or search warrant. Refusal to submit to such a search is a violation of the conditions of supervision.

[x] shall forfeit the items listed in the preliminary order of forfeiture.

[x] shall complete 104 hours of community service within the first year of supervised release as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment	Fine	Restitution
Totals:	$100.00	$ $

[ ] if applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

[ ] The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612 (g).

[ ] The Court determined that the defendant does not have the ability to pay interest and it is ordered that.

[ ] The interest requirement is waived

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below. Restitution shall be due immediately. If not paid in full at the time of release from confinement, the defendant shaft make restitution payments in monthly installments of not less than $100.00, until such time as restitution has been paid in full. The defendant shall begin making restitution payments not more than 30 days following release from confinement. Payments are to be forwarded to the Court Clerk for distribution to the victims.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals: $_____	$_____	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title l8 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied ;n the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of prosecution: (5) interest: (6) penalties.

Payment of total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately;

[ ] restitution - due immediately, if not paid in full et the time of release from confinement, the defendant shall make restitution payments in monthly installments of not less than $100.00, until such time aa restitution has been paid in full. The defendant shall begin making restitution payments not more than 30 days following release from confinement. Payments are to be forwarded to the Court Clerk for distribution to the victims as funds are accumulated. Any payments shall be divided proportionately and distributed to the payees named.

[ ] $____ immediately, balance due (in accordance with C, D, or E); or

[ ] not later than _____; or

[ ] in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

[ ] in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____

over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s}:

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

APPENDIX C

ORDER OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DATED 9-22-04

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v. No. 03-6144

MICHAEL ALBERT CERVINI,
Defendant - Appellant.

ORDER
Filed September 22, 2004
Before KELLY, HOLLOWAY and McCONNELL,
Circuit Judges.

Appellant's petition for rehearing is denied. Judge Holloway voted to grant.

The petition for rehearing en bane was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /SS/
Deputy Clerk

APPENDIX D

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DATED 7-31-01

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ALBERT CERVINI, Defendant-Appellant.

No. 00-6331

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2001 U.S. App. LEXIS 17105; 2001 Colo. J. C.A.R. 3928

July 31, 2001, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: (Western District of Oklahoma). (D.C. No. CR-99-206-L).

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Criminal defendant entered a conditional guilty plea to one count of possessing child pornography in violation of 18 U.S.C.S. § 2252A(a)(5)(B). The defendant appealed from the final judgment of the United States District Court for the Western District of Oklahoma which denied his motion to suppress and his request for an evidentiary hearing.

OVERVIEW: Two images of child pornography were posted to an Internet newsgroup. Accompanying the postings were message headers that included an Internet protocol address linked to the Internet service provider account of the criminal defendant. After an investigation, a search warrant for the defendant's residence was issued and executed. The defendant filed a motion to suppress the evidence obtained during the search of his residence. The district court denied the motion and ruled that he was not entitled to an

evidentiary hearing. The defendant appealed the district court's judgment. The appellate court found that the search warrant affidavit asserted sufficient facts to establish probable cause that evidence of criminal activity would be found in the defendant's residence. The defendant did not demonstrate to the court that the exclusion of one e-mail address or the inclusion of the other e-mail address in the affidavit would have vitiated probable cause. Thus, the district court did not abuse its discretion in denying the defendant an evidentiary hearing on his motion to suppress.

OUTCOME: The judgment was affirmed.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Randal A. Sengel, Daniel G. Webber, Jr., Office of the United States Attorney, Oklahoma City, OK.

For MICHAEL ALBERT CERVINI, Defendant - Appellant: Mack K. Martin, J. David Ogle, Martin Law Office, Oklahoma City, OK.

JUDGES: Before EBEL, ANDERSON, and MURPHY, Circuit Judges.

OPINIONBY: Michael R. Murphy

OPINION: ORDER AND JUDGMENT *

----------Footnotes----------

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

----------End Footnotes----------

I. INTRODUCTION

Defendant Michael Cervini entered a conditional guilty plea [*2] to one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Cervini appeals from the district court's final judgment, asserting the district court erred in denying his motion to suppress and his request for an evidentiary hearing. See Fed. R. Crim. P. 11(a)(2) (providing that a defendant, with approval of the court and consent of the government, may enter conditional guilty plea and reserve right to appeal an adverse determination of pretrial motion). This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and affirms the district court.

II. BACKGROUND

In April 1999, two images of child pornography were posted to an Internet newsgroup. Accompanying the postings were message headers that included an Internet protocol address linked to the Internet service provider account of Michael Cervini. After an investigation, a search warrant for Cervini's residence was issued and executed.

In December 1999, Cervini was indicted for knowingly transporting and shipping child pornography in interstate commerce in violation of 18 U.S.C. § 2252A(a)(1) and knowingly possessing [*3] an image of child pornography that was produced using materials shipped and transported in interstate commerce in violation of 18 U.S.C. § 2252A(a)(5)(B). Cervini filed a motion to suppress the evidence obtained during the search of his residence, arguing the affidavit in support of the warrant provided insufficient probable cause that evidence of criminal activity would be found at his residence. The district court denied Cervini's motion and ruled that he was not entitled to an evidentiary hearing.

Cervini entered a conditional guilty plea to possessing child pornography, and the government dismissed the other charge. Cervini comes before this court on appeal from the district court's denial of his motion to suppress and its denial of his request for an evidentiary hearing on his motion.

III. DISCUSSION

Cervini challenges the district court's denial of his motion to suppress, arguing the affidavit supporting the search warrant provided insufficient probable cause to establish a nexus between the criminal activity and Cervini's residence. In reviewing the denial of a motion to suppress, this court reviews the district court's factual findings for clear [*4] error and its legal conclusions regarding the sufficiency of the search warrant de novo. See United States v. Campos, 221 F.3d 1143, 1146 (10th Cir. 2000); United States v. Simpson, 152 F.3d 1241, 1246 (10th Cir. 1998). This court reviews the district court's denial of an evidentiary hearing on a motion to suppress for abuse of discretion. See United States v. Chavez-Marquez, 66 F.3d 259, 261 (10th Cir. 1995).

"In determining whether probable cause exists to issue a warrant, the issuing judge must decide whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Simpson, 152 F.3d at 1246 (quotations omitted). The judge may draw reasonable inferences from the affidavit in support of the search warrant application. See United States v. Rowland, 145 F.3d 1194, 1205 (10th Cir. 1998). The issuing judge must ultimately make a practical, common-sense decision based on the totality of the circumstances. See United States v. Corral-Corral, 899 F.2d 927, 931 (10th Cir. 1990). This court affords great deference to the judge's final [*5] determination. See id.

On appeal, Cervini claims the information in the affidavit does not establish that the transmission of pornographic images originated from a computer at his residence or that he even owned a computer. Cervini further argues the second telephone line in his residence could have been used for a purpose other than establishing an Internet connection.

Affording great deference to the issuing judge's determination, this court concludes the search warrant affidavit asserted sufficient facts to establish probable cause

that evidence of criminal activity would be found in Cervini's residence. Terry Wade, a Special Agent for the Federal Bureau of Investigation and former agent for the Oklahoma Bureau of Investigation, applied for a warrant to search Cervini's residence, attaching a personal affidavit to the application in support of the warrant. The affidavit describes in some detail the process by which an individual may post a message to an Internet newsgroup and the manner in which the individual may be traced from his posting.

In addition, the affidavit includes details of the specific crime for which the search warrant was sought. Special Agent Wade indicated [*6] in his affidavit that two images of child pornography were posted to an Internet newsgroup just before 1:00 a.m. on April 27, 1999. The message header accompanying the transmission contained the Internet protocol (IP) address 206.154.188.85 and revealed that the message was posted from a news server owned by Innovative Technology, Ltd., an Internet service provider (ISP). The ISP's records revealed that the account responsible for the posting had been in use for four hours and was not logged off until just before 3:00 a.m. In response to a grand jury subpoena, the ISP identified the account holder from the IP address as Michael Cervini. The ISP provided Cervini's address and indicated that his customer account status was active. Cervini's residential address was corroborated through both a records check of Southwestern Oklahoma State University and an Oklahoma driver's license query.

Further, current telephone listings revealed that Cervini's residence contained two active telephone lines. Special Agent Wade indicated that based upon his knowledge and training, it is common practice for individuals utilizing a home computer for access to the Internet to have a second telephone line [*7] in their home. Wade further indicated that he conducted an interview with Cervini's neighbor who revealed that Cervini was knowledgeable about computers

and had worked on a computer-related project for a family member of the neighbor's at Cervini's home.

In his brief, Cervini pays little regard to the standard for establishing probable cause. The search warrant affidavit must demonstrate a "fair probability" that a search of Cervini's residence would uncover evidence connecting Cervini to the pornographic postings. Simpson, 152 F.3d at 1246. It need not eliminate all other possible conclusions which could be derived from the alleged facts. The issuing judge reasonably could have inferred from the facts provided in the affidavit that (1) an individual is likely to generate child pornography in a location where he has the greatest expectation of privacy; (2) a computer would be found at an ISP subscriber's residence; (3) Cervini was most likely at home at 1:00 a.m.; and (4) as the account holder, Cervini was the person using the account. Contrary to Cervini's claim, these conclusions do not require the issuing judge to pile inference upon inference. The totality of [*8] the facts enable a reasonable person to draw the common-sense conclusion that evidence of the crime would be found at Cervini's residence. n1 See *United States v. $ 149,442.43 in U.S. Currency,* 965 F.2d 868, 874 (10th Cir. 1992) ("Where an affidavit describes circumstances which would warrant a person of reasonable caution to believe that the articles sought would be at appellant's residence, then a sufficient nexus has been established.").

----------Footnotes----------

n1 Cervini claims the information gathered from his neighbor was stale because no time frame was given for the alleged computer-related project performed at his home. This court need not determine whether the information was stale. Even without this information, the affidavit contains sufficient facts to support the issuance of a search warrant.

----------End Footnotes----------

Cervini also argues on appeal that the district court erred in not holding an evidentiary hearing on the issues he raised in his motion to suppress. Cervini alleges that the

search warrant affidavit recklessly omitted [*9] information that would have vitiated probable cause. Specifically, Cervini claims (1) the affidavit lists the e-mail address eyeBme at fish.net as the source of the pornographic postings, while Cervini's e-mail address was mike at ITLnet.net during the relevant time period; (2) the affiant discovered that Cervini was a student at Southwestern Oklahoma State University and that, in the course of learning this information, the affiant also should have learned that Cervini was employed by the University as a Library Computer Technician with access to many computers; and (3) the affidavit was void of information that the pornographic images could have been posted on the Internet from anywhere in the world through the use of a computer at any location. Because Cervini failed to raise the last two arguments before the district court, this court deems them waived and only addresses his argument regarding the e-mail address. See *United States v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991).

A defendant is entitled to a hearing only if he can make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, [*10] was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The rule entitling a defendant to a hearing also applies to material omissions if the omissions are so probative as to negate probable cause. See *United States v. Kennedy*, 131 F.3d 1371, 1377 (10th Cir. 1997); *DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir. 1990). A defendant makes a preliminary showing if he demonstrates that the exclusion of a false statement contained in the affidavit or the inclusion of a material omission not contained in the affidavit would have vitiated probable cause. See *Stewart v. Donges*, 915 F.2d 572, 581-83 (10th Cir. 1990); *Corral-Corral*, 899 F.2d at 933.

Although Cervini characterizes the problem with the affidavit as an omission, his claim in fact includes both an allegation of a false statement and an allegation of a material omission. The inclusion of eyeBme at fish.net as the e-mail address connected to Cervini's Internet account is more properly [*11] characterized as an alleged false statement, while the exclusion of Cervini's e-mail address as mike at ITLnet.net is accurately characterized as an alleged material omission. Regardless of how the issue is framed, however, Cervini did not demonstrate to the district court that the exclusion of the eyeBme at fish.net e-mail address or the inclusion of the mike at ITLnet.net e-mail address in the affidavit would have vitiated probable cause. n2

----------Footnotes----------

n2 This court need not address whether the affidavit actually contained a false statement or omitted material information because Cervini cannot demonstrate that the alleged false statement or material omission were necessary to the finding of probable cause.

----------End Footnotes----------

Even if the eyeBme at fish.net e-mail address is excluded from the affidavit, a connection between the pornographic postings and Cervini arises through the IP address linked to his ISP account. Hence, the exclusion of the eyeBme at fish.net e-mail address from the affidavit would not have negated a finding of probable [*12] cause. An examination of the alleged material omission results in the same conclusion. Including mike at ITLnet.net as Cervini's alleged e-mail address would not create an inconsistency in the affidavit, nor would it render the affidavit insufficient to establish probable cause.

The affidavit sets forth the following relevant information. When an individual posts a message to an Internet newsgroup, the message is sent through a newsgroup computer server that automatically attaches a "message header" to the message. In this case, the "message header" on the messages that accompanied the pornographic images

showed an IP address of 206.154.188.85, which is the IP address linked to Cervini's ISP account. The individual who posted the pornographic images placed a text return address of eyeBme at fish.net in each of the messages accompanying the images. According to the affidavit, however, this text return address is not automatically attached to the message as is the IP address. It would be reasonable for an issuing judge to infer that an automatically-attached identifier is more accurate than an e-mail address imputed by the individual posting the pornographic images who might want to [*13] conceal his identity. Even with the inclusion of the e-mail address mike at ITLnet.net, the IP address still links Cervini's ISP account to the posting of pornographic images.

The exclusion of the alleged false statement and inclusion of the alleged material omission would not have undermined the probable cause determination. Cervini made no such showing in his motion to suppress to the district court to warrant a hearing. Thus, this court holds the district court did not abuse its discretion in denying Cervini an evidentiary hearing on his motion to suppress.

IV. CONCLUSION

For the reasons stated above, this court affirms the district court's denial of Cervini's motion to suppress and affirms the district court's refusal to hold an evidentiary hearing on the matter.

Entered for the Court
Michael R. Murphy
Circuit Judge

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APPENDIX E

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED 4-30-03

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED APR 30 2003

UNITED STATES OF AMERICA,
Plaintiff,

v

No. CR-99-206-L
No. CIV-02-596-L

MICHAEL CERVINI,
Defendant.

JUDGMENT

Pursuant to the Order issued this date, the Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and First Amended Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 are denied.

Entered this 30 day of April, 2003.

/SS/
TIM LEONARD
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED APR 30 2003

UNITED STATES OF AMERICA,
Plaintiff,

v

No. CR-99-206-L
No. CIV-02-596-L

MICHAEL CERVINI,
Defendant.

ORDER

On December 7, 1999, a federal grand jury returned a two-count indictment against defendant charging him with transporting and shipping child pornography in interstate commerce and possessing an. image of child pornography that was produced using materials that bad been shipped and transported in interstate commerce. On June 15, 2000, defendant filed a motion to suppress items seized by law enforcement officers at his home in Weatherford, Oklahoma. Defendant argued that the affidavit in support of the search warrant provided insufficient basis to believe that a computer would be found at his residence or that child pornography would be on the computer. On August 4, 2000, the court issued an Order denying defendant's motion to suppress. The court found that the affidavit in support of the search warrant gave the magistrate judge sufficient information to determine that there was "a fair probability" that a computer would be found at defendant's house and that child pornography would be found on that computer.

Thereafter, defendant entered a conditional guilty plea to the possession count of the indictment. At the change of plea hearing, the following colloquy between the prosecutor and defendant occurred:

> Q. (BY MR. SENGEL) As to Count Two of the indictment, on or about September 7, 1999, in Weatherford, Oklahoma did you knowingly possess images of child pornography that were contained on your computer? A. Yes, I did.
>
> Q. Did the images show persons under the age of 18 engaged in sexually explicit activity? A. Yes.
>
> Q. Were the! images shipped and transported in interstate commerce including by computer?
>
> A. Yes.

Reporter's transcript of Proceedings Had on Tuesday, September 26, 200-0 at 14-15. That same date, the court

sentenced defendant to 27 months imprisonment and a three-year term of supervised release.

On appeal, defendant once again argued that the warrant affidavit provided insufficient probable cause to establish that the transmission of pornographic images originated from a computer at his home or even that he owned a computer. The Court of Appeals fof the Tenth Circuit affirmed this court's ruling on defendant's motion to suppress, holding that "[t]he totality of the facts enable a reasonable person to draw the common-sense conclusion that evidence of Lhe crime would be found at Cervini's residence." United States [2]v. Cervini, Case No. 00-633 1, slip op. at 6 (10th Cir. July 31, 2001). The Court also held that this court did not abuse its discretion by ruling on defendant's motion without holding. an evidentiary hearing. Defendant bad argued that a hearing was required because the afflant recklessly omitted material information that would have vitiated probable cause.

> Specifically, Cervini claim[ed] (1) the affidavit lists the e-mail address eyeBme@fish.net as the source of the pornographic postings, while Cervini's e-mail address was mike@ITLnet.net during the relevant time period; (2) the affiant discovered that Cervini was a student at Southwestern Oklahoma State University and that, in the course of learning this information, the affiant also should have learned that Cervini was employed by the University as a Library Computer Technician with access to many computers; and (3) the affidavit was void of information that the pornographic images could have been posted on the 'Internet from anywhere in the world through the use of a computer at any location.

Id. at 7. The Court of Appeals declined to rule on the latter two arguments, finding that defendant had waived them by

not first presenting them to this court. With respect to the remaining argument, the Court found that the omitted information would not have undermined the probable cause determination.

This matter is before the court on defendant's motion to vacate his sentence pursuant to 28 U.S.C. § 2255.[1] A prisoner who is in custody may move to vacate, set aside, or Correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such

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Defendant initially filed his motion pro se. On May 20, 2002, counsel for defendant entered his appearance in this action.

---------- End Footnotes----------

[3] sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. As an initial matter, the court notes that while defendant has served his sentence of incarceration, he is currently on supervised release and therefore is "in custody" for purposes of § 2255. See *Oyler v. Allenbrand*, 23 F.3d 292, 293-94 (10th Cir. 1994); *Olson v. Hart*, 965 F.2d 940, 942-43 (10th Cir. 1992).

Defendant presents two arguments in support of his request for relief. First, he contends that his Sixth Amendment right to effective assistance of counsel was violated because trial counsel failed to properly investigate matters relevant to his motion to suppress and failed to present material evidence in support of that motion. Second, defendant contends that he was denied his First and Fifth Amendment rights when he was convicted and sentenced under a statute that is unconstitutional on its face. In support of this argument, defendant relies on the decision of the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S.234 (2002).

The government argues that defendant's claims are subject to procedural bar as they were not raised on appeal.

"[Section] 2255 is not available to test the legality of matters which should have been raised on appeal." *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994). Defendant is barred from raising arguments for the first time in his 2255 motion "unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice [4] will occur if his claim is not addressed." *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)), However, claims of ineffective assistance of counsel, such as those raised by defendant, are not subject to procedural bar and, in fact, are more appropriately raised for the first time in § 2255 motions. *Massaro v. United States*, __ U.S. _, 2003 WL 1916677 (April 23, 2003). Moreover, ineffective assistance of counsel may provide cause for a procedural default. See *United States v. Galloway*, 56 F.3d 1239, 1241 (10th Cir. 1995) (en banc). In addition to its procedural argument, the government contends that defendant's claims both fail on the merits.

Since defendant's ineffective assistance of counsel claim is based on allegations that counsel failed to effectively investigate and argue the motion to suppress, defendant must first prove that his Fourth Amendment claim is valid. *United States v. Owens*, 882 F.2d 1493, 1498 (10th Cir. 1989) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986)). If defendant fails to make the threshold showing of a Fourth Amendment violation, the court need not reach the Sixth Amendment claim. *Owens*, 882 F.2d at 1501. To establish a claim of ineffective assistance of counsel, defendant must show not only that counsel's performance was deficient, but also that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of a guilty plea, the prejudice prong is established if defendant demonstrates that "there is a reasonable [5] probability that, but for counsel's errors, he would not have

pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The court finds that defendant cannot meet his initial burden of demonstrating a Fourth Amendment violation. The additional information that defendant asserts should have been included in the search warrant affidavit would not have vitiated the probable cause determination, None of this information would have altered the fact that the magistrate could reasonably infer that a computer would be found at an ISP subscriber's residence and that a person is likely to generate or store child pornography at his home as opposed to his work. As defendant fails to establish a meritorious Fourth Amendment claim, the court need not address his ineffective assistance of counsel claim. In addition, as the court record conclusively shows that defendant is not entitled to relief, an evidentiary hearing is not required. 28 U.S.C. § 2255.

The court also need not address defendant's *Ashcroft* claim as that claim is procedurally defaulted because defendant did not raise it either before his plea of guilty or on appeal. A defaulted claim may be raised for the first time in a habeas motion only if the defendant demonstrates cause for the default and actual prejudice or that he is "actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998). Cause can be shown by demonstrating that defendant's

> efforts to raise the claim at earlier stages were "impeded" by "some objective factor external to the defense," for example, where "the factual or legal basis for a claim was not reasonably available to counsel" during earlier proceedings. The standard [6] is an objective one, asking not what a particular attorney or pro se petitioner actually knew but whether the claim was reasonably available" upon diligent inquiry.

> When controlling law changes after earlier review has been completed, a petitioner may be able to demonstrate that the new legal claim was "not reasonably available" under the old prevailing standard. Changes in law do not automatically constitute cause, however: "even if the law has changed since the earlier petition [a petitioner] also must show that he or his attorney reasonably should not have been aware of the possibility or legal basis for such a claim." Cause is present if the constitutional claim is so novel that its legal basis is not reasonably available to counsel" prior to the change in law.

Daniels v. United States, 254 F.3d 1180, 1190 (10th Cir. 200 1) (citations omitted). A legal claim is not novel if the Federal Reporters contain cases discussing the very claim at issue. *Bousley*, 523 U.S. at 622; *Daniels*, 254 F.3d at 1191. "Actual innocence" requires a showing of "factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at 623.

Based on this standard, the court finds that defendant is not entitled to relief; he has shown neither cause for his failure to raise the *Ashcroft* claim, nor that be is actually innocent. Defendant pled guilty on September 26, 2000. Prior to that date, a number of reported decisions discussed the precise First Amendment claim defendant now seeks to raise. See *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), aff'd, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Hilton*, 167 F.3d 61 (1st Cir.), *cert. denied*, 528. U.S. 844 (1999) (reversing *United States v. Hilton*, 999 F. Supp. 121 (D. Me. 1998)); *United States v. Fiscus*, 105 F. Supp. 2d 1219 (D. Utah 2000); *United States v. Pearl*, 89 F. Supp. 2d 1237 (D. Utah [7] 2000), aff'd in part and vacated in part, ___ F.3d ___ 2003 WL 1827799 (10th Cir. Apr. 9, 2003); *United States v. Fox*, 74 F. Supp. 2d 696

(E.D. Tex. 1999), aff'd 248 F.3d 394 (5th Cir. 2001). See also *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000); *United States v. Matthews*, 11 F.Supp. 2d, 656 (D. Md. 1998). Thus, the legal issue cannot be considered novel. Nor has defendant established his factual innocence. Defendant's argument that "[i]t is impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense in Mr. Cervini's case were actual identifiable minor children"[2] and "were not simply computer generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors"[3] is belied by his admission

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2 Movant's Statement of Undisputed Issues of Material Fact at 1.

3 Id. (emphasis in original).

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at the plea hearing that the images "show[ed] persons under the age of 18 engaged in sexually explicit activity". Reporter's Transcript of Proceedings had on Tuesday, September 26, 2000 at 15.

For the reasons set forth above, defendant's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 52) and First Amended Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 68) are DENIED. Defendant's Motion to Amend (Docket No. 64) is GRANTED. The First Amended Motion Pursuant to 28 U.S.C. § 2255 that was filed on September 4, 2002 is deemed to have been filed with permission. The government's Motion to Strike Defendant's Traverse and First Amended Motion to Vacate Sentence [8] Pursuant to 28 U.S.C. § 2255 (Docket No. 72) is DENIED. Judgment shall issue accordingly.

It is so ordered this 30 day of April, 2003.

/SS/

TIM LEONARD
United States District Judge

APPENDIX F

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
DATED 5-28-03

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs. CR-99-206-L

MICHAEL ALBERT CERVINT,
Defendant.

ORDER

Defendant, a prisoner appearing pro se, has f i led a Notice of Appeal (Doc. No. 77) and a request for a 28 U.S.C. §2253 Certificate of Appealability [Doc. No. 78] to appeal this Court's denial of his 28 U.S.C.§2255 motion to vacate, set aside or correct sentence.

Defendant is entitled to a COA only upon making a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Defendant can make such a showing by demonstrating that the issues he seeks to raise are deserving of further proceedings, debatable among jurists of reason, or subject to different resolution on appeal. See *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) ("[W]e give the language found in § 2253(c) the meaning ascribed it in [*Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)], with due note for the substitution of the word 'constitutional'"). "Where a district court has rejected the constitutional claims on the merits, ... [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. When a prisoner's habeas petition is dismissed on procedural grounds without reaching the merits of the prisoner's claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

The Defendant has not made this requisite showing- Accordingly, the request for a Certificate of Appealability is DENIED.

IT IS SO ORDERED this 28th day of May, 2003.

/SS/

TIM LEONARD
United States District Judge

APPENDIX G

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED 12-11-03

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed December 11, 2003

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v. No. 03-6144
MICHAEL ALBERT CERVINI,
Defendant - Appellant.

ORDER

Before HENRY, Circuit Judge.

We deny Mr. Cervini's request for a certificate of appealability (COA) on his Sixth Amendment ineffective assistance of counsel claim and his Fifth Amendment involuntary plea claim, However, we grant Mr. Cervini a COA on his First Amendment claim based on Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). We order the parties to respond to the following issues:

(1) Whether *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), can be applied retroactively to Mr. Cervini's case, in light of the Supreme Court's holdings in *Teague v. Lane*, 489 U.S. 288 (1989) and *Bousley v. United States*, 523 U.S. 614 (1998).

(2) Whether Mr. Cervini has satisfied either the "cause and prejudice" or the "actual innocence" requirement of overcoming procedural bar.

Simultaneous briefs shall be filed within 30 days of the date of this order.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /SS/
Deputy Clerk

Supreme Court, U.S.
FILED
FEB 3 - 2005
OFFICE OF THE CLERK

(3)

No. 04-768

In the Supreme Court of the United States

MICHAEL ALBERT CERVINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
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Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether petitioner was precluded from challenging the voluntariness of his guilty plea for the first time on collateral review because he had failed to demonstrate that he was "actually innocent" of possessing child pornography.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 4, 8, 9, 10
Bailey v. *United States*, 516 U.S. 137 (1995) 11
Bousley v. *United States*, 523 U.S. 614 (1998) .. 5, 8, 9
Hamling v. *United States*, 418 U.S. 87 (1974) 9
Muscarello v. *United States*, 524 U.S. 125 (1998) .. 11
Schlup v. *Delo*, 513 U.S. 298 (1995) 6, 10
United States v. *Benboe*, 157 F.3d 1181 (9th Cir. 1998) 11, 12
United States v. *Boyd*, 312 F.3d 213 (6th Cir. 2002) 11
United States v. *Montano*, 381 F.3d 1265 (11th Cir. 2004) 11, 12
United States v. *Sanders*, 157 F.3d 302 (5th Cir. 1998) 11, 12
Waucaush v. *United States*, 380 F.3d 251 (6th Cir. 2004) 11, 12

Constitution and statutes:

U.S. Const. Amend. I 8
Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, 110 Stat. 3009-26 8
18 U.S.C. 924(c) .....

Statutes and regulation—Continued: Page

18 U.S.C. 1962 11
18 U.S.C. 2252A(a)(1) 2
18 U.S.C. 2252A(a)(5)(B) 2, 11
18 U.S.C. 2256(8)(A) 9
18 U.S.C. 2256(8)(B) 4, 8
18 U.S.C. 2256(8)(D) 8
28 U.S.C. 2255 ..... 2, 4, 6
Unites States Sentencing Guidelines § 2G2.2(b)(2) ... 11

In the Supreme Court of the United States

No. 04-768

MICHAEL ALBERT CERVINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 379 F.3d 987. The opinion of the district court (Pet. App. E1-E8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2004. A petition for rehearing was denied on September 22, 2004 (Pet. App. C1). The petition for a writ of certiorari was filed on November 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional plea of guilty in the United States District Court for the Western District of Oklahoma, petitioner was convicted of one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. D1-D9.

Petitioner subsequently filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion. Pet. App. E1-E8. After granting a certificate of appealability, the court of appeals affirmed. *Id.* at A1-A16.

1. In April 1999, petitioner posted two images of child pornography to an Internet newsgroup. Pet. App. D3. The material depicted a minor female engaged in sexually explicit conduct. Presentence Report (PSR) 4-5. During a subsequent search of petitioner's home, agents discovered hundreds of pornographic images on his computer's hard drive, many of which depicted children under the age of 12. PSR 4.

2. In December 1999, a federal grand jury charged petitioner with shipping child pornography in interstate commerce, in violation of 18 U.S.C. 2252A(a)(1), and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. A2. Pursuant to a plea agreement, petitioner entered a conditional plea of guilty to the possession charge, reserving the right to appeal the district court's denial of his motion to suppress evidence seized during the search of his residence. Gov't C.A. Br. 2; Pet. App. A2-A3, D3. The Section 2252A(a)(1) charge was dismissed. Pet. App. A3.

At his plea colloquy, petitioner engaged in an exchange with his attorney to establish a factual basis for his plea:

> Q: [O]n or about September 7, 1999, * * * did you knowingly possess images of child pornography that were contained on your computer?
>
> A: Yes, I did.
>
> Q: Did the images show persons under the age of 18 engaged in sexually explicit conduct?
>
> A: Yes.

9/26/00 Tr. 14-15; Pet. App. A9.[1] In his plea agreement, petitioner also admitted that his computer "contain[ed] visual depictions involving the use of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252A." Amended Plea Agreement 4 (Aug. 28, 2000); Pet. App. A9.

In its recitation of petitioner's offense conduct, the PSR stated:

> The image [petitioner posted on the internet] contained an image depicting a minor engaged in sexually explicit conduct. Investigative reports indicate that the image is of an unknown minor female with her legs spread. The image is centered on her genitals. Agents advised that this image is of an individual under the age of 18.

---

[1] Petitioner further admitted that the relevant images were "shipped and transported in interstate commerce including by computer." 9/26/00 Tr. 15.

PSR 4; see also *ibid.* (hard drive of petitioner's computer "contained hundreds of pornographic images, numerous of which depicted children under the age of 12"). Petitioner did not object to the PSR, see 9/26/00 Tr. 17, and he did not otherwise dispute that the images he possessed were of real children engaged in sexually explicit conduct. The district court sentenced petitioner to 27 months of imprisonment, to be followed by three years of supervised release. See Tr. 23.

3. As provided in the plea agreement, petitioner appealed the district court's order denying his motion to suppress the evidence seized at his residence, as well as his request for a related evidentiary hearing. The court of appeals affirmed the district court's rulings on both issues. Pet. App. D1-D9.

4. Approximately nine months after the court of appeals affirmed petitioner's convictions, this Court issued its decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The Court in *Free Speech Coalition* held that the definition of child pornography contained in former 18 U.S.C. 2256(8)(B), which encompassed any "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," was overbroad and violative of the First Amendment. See 535 U.S. at 244-256. The Court concluded, *inter alia*, that the justifications for proscribing pornographic images that are the product of child sexual abuse are not fully applicable to "virtual" child pornography—*i.e.*, visual depictions created without the participation of real children. See *id.* at 249-251.

5. The following month, petitioner filed a motion for post-conviction relief pursuant to 28 U.S.C. 2255. Petitioner contended, *inter alia*, that the statute under which he had been convicted was unconstitutional under

Free Speech Coalition. See Pet. App. E4. He further contended that his guilty plea was unknowing and involuntary because it was made at a time when neither the statutory text nor the pertinent case law distinguished between actual and virtual child pornography. See *id.* at A4.

The district court held that petitioner was not entitled to relief. See Pet. App. E1-E8. The court explained that, because petitioner had not raised his constitutional challenge either before his plea of guilty or on direct appeal, the claim could be raised on collateral review only if petitioner could "demonstrate[] cause for the default and actual prejudice or that he is 'actually innocent.'" *Id.* at E6 (quoting *Bousley* v. *United States*, 523 U.S. 614, 622 (1998)). The district court held that petitioner could not establish "cause" for his procedural default because a number of litigants had raised essentially the same First Amendment challenge even before petitioner had entered his guilty plea. See *id.* at E7-E8. In support of his claim of innocence, petitioner argued that it is "impossible to say beyond a reasonable doubt that the images allegedly involved in the charges and offense * * * were actual identifiable minor children," rather than "computer generated images of non-existent, unidentifiable individuals and/or computer modified images of adults which appeared to be or gave the impression that they were minors." *Id.* at E8. The district court rejected that argument, based largely on petitioner's admission at the plea hearing that the images he possessed "show[ed] persons under the age of 18 engaged in sexually explicit activity." *Ibid.* (quoting 9/26/00 Tr. 15).

6. The court of appeals granted a certificate of appealability on two questions: (1) whether petitioner

had made a sufficient showing of actual innocence to overcome the procedural bar against consideration on collateral review of previously defaulted claims; and (2) whether the rule announced in *Free Speech Coalition* applies retroactively to cases on collateral review. Pet. App. A4. The court ultimately affirmed the district court's denial of post-conviction relief, holding that petitioner had failed to make the requisite showing of "actual innocence" to excuse his procedural default. *Id.* at A1-A13.

a. Petitioner contended that, in light of *Free Speech Coalition*, he satisfied the "actual innocence" standard because it was impossible to determine beyond a reasonable doubt whether the pornography he possessed depicted real children. Pet. App. A7. The court of appeals "assume[d] in theory that if a movant really could produce evidence that would convince a reasonable juror that the image in question is indeterminate (such that it [is] not possible to conclude that the image is actual beyond a reasonable doubt), a movant would be actually innocent." *Ibid.* The court held, however, that petitioner had failed to make the requisite factual showing. *Id.* at A7-A13.

In describing petitioner's burden, the court of appeals explained that a Section 2255 movant seeking to demonstrate "actual innocence" must produce "new reliable evidence" that, when viewed together with the original evidence of guilt, is "powerful enough to convince a court that no reasonable juror would have voted to convict." Pet. App. A6, A8 (citing *Schlup* v. *Delo*, 513 U.S. 298 (1995)). Petitioner proffered congressional testimony from the president of the National Center for Missing and Exploited Children, who had stated that virtual pornographic images can be indistinguishable

from actual images, as well as an advertisement from a software company that demonstrated the technique of "morphing." *Id.* at A7-A8. Petitioner also indicated that he would like to call an expert to testify in support of his theory. *Id.* at A8. The court of appeals held that the new evidence, while having "some probative value as to [petitioner's] innocence" (*ibid.*), was outweighed by the original evidence of petitioner's guilt—particularly petitioner's admissions, in his plea colloquy and plea agreement, that the pornographic images he possessed were of actual children. See *id.* at A9 (quoting plea colloquy); *ibid.* ("[Petitioner's] admission in the plea agreement is quite specific that actual minors were used; not indistinguishable images."). Examining petitioner's new evidence together with the prior evidence of guilt, the court concluded that "it simply is not probable that no reasonable juror would find him guilty beyond a reasonable doubt—no matter what an expert might now say." *Ibid.*

b. Judge Holloway dissented. Pet. App. A13-A16. She would have found the statements in petitioner's plea colloquy and plea agreement to be ambiguous on whether the pornographic images were of actual children. *Id.* at A14-A15.

ARGUMENT

Petitioner contends (Pet. 23-30) that he is "actually innocent" of possessing child pornography in light of *Free Speech Coalition*, and that he is therefore entitled to challenge the voluntariness of his guilty plea on collateral review despite his procedural default. That claim lacks merit and does not warrant this Court's review.

1. Because petitioner did not contend on direct appeal that his guilty plea was unknowing and involuntary, and did not argue that application of the child pornography statute to his conduct was unconstitutional, his current claims are procedurally defaulted. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) ("even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review"). A defendant may raise a defaulted claim on collateral review only if he can first show either "cause" for failing to raise it earlier and actual "prejudice," or that he is "actually innocent" of the crime of which he stands convicted. *Id.* at 622. Because petitioner does not claim to have satisfied the "cause and prejudice" requirement, the relevant inquiry is whether he has demonstrated his "actual innocence" of the child pornography offense. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* at 623 (internal quotation marks omitted).

In *Free Speech Coalition*, this Court struck down as overbroad under the First Amendment two provisions of the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, 110 Stat. 3009-26. One provision defined the term "child pornography" to include a visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B); see 535 U.S. at 244-256. The other defined the term to include a visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(D); see 535

U.S. at 257-258. The Court did not question the constitutionality of 18 U.S.C. 2256(8)(A), which covers any visual depiction whose production "involves the use of a minor engaging in sexually explicit conduct."

In addressing petitioner's request for collateral review, the court of appeals assumed, *arguendo*, that a movant for post-conviction relief could satisfy the "actual innocence" standard in this context by "produc[ing] evidence that would convince a reasonable juror that the image in question is indeterminate (such that it is not possible to conclude that the image is actual beyond a reasonable doubt)." Pet. App. A7. The court concluded, however, that petitioner had failed to make the requisite factual showing. See *id.* at A7-A9. Petitioner's factbound disagreement with the court of appeals' application of the established legal standard does not warrant this Court's review. Cf. *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals.").

2. The court of appeals was correct in holding that petitioner had failed to satisfy the "actual innocence" standard. That standard requires a showing of "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. In his plea colloquy and plea agreement, petitioner acknowledged that the images he possessed "show[ed] persons under the age of 18 engaged in sexually explicit conduct," and that his computer "contain[ed] visual depictions involving the use of minors engaging in sexually explicit conduct." See page 3, *supra*; see also Pet. App. A11 ("The ordinary and reasonable meaning of the admission in the plea agreement is that the images involved the 'use' of real mi-

nors."). In his subsequent attempt to call those admissions into question, petitioner has presented no evidence focusing on the particular images he possessed, or casting doubt on the likelihood that those images depicted actual children engaging in sexually explicit activity. See *id.* at A10. Rather, his claim is that, as a general matter, "it is difficult to tell the difference" between actual and virtual child pornography. *Id.* at A9.

In *Free Speech Coalition*, this Court rejected as "somewhat implausible" the contention that virtual pornographic images are generally indistinguishable from images that depict actual children engaged in sexually explicit activity. 535 U.S. at 254. The Court explained that, "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice." *Ibid.* Absent any particularized basis for doubting that the images petitioner possessed "were exactly what they purported to be" (Pet. App. A10), the generalization on which petitioner relies is insufficient to establish his "actual innocence" of the child pornography offense. Cf. *Schlup* v. *Delo*, 513 U.S. 298, 321 (1995) (explaining that the "actual innocence" standard was adopted in order to ensure that the "fundamental miscarriage of justice exception" to procedural default rules "would remain rare and would only be applied in the extraordinary case") (internal quotation marks omitted).

3. Contrary to petitioner's contention (Pet. 24-29), the Tenth Circuit's decision in this case does not conflict with any decision of another court of appeals. The cases on which petitioner principally relies (see Pet. 25-26, 28)

did not involve prosecutions for child pornography offenses. In three of those cases, the movants for post-conviction relief invoked this Court's decisions in *Bailey* v. *United States*, 516 U.S. 137 (1995), and *Muscarello* v. *United States*, 524 U.S. 125 (1998), in challenging their firearms convictions under 18 U.S.C. 924(c). See *United States* v. *Montano*, 381 F.3d 1265, 1268-1274 (11th Cir. 2004); *United States* v. *Sanders*, 157 F.3d 302, 304-306 (5th Cir. 1998); *United States* v. *Benboe*, 157 F.3d 1181, 1183-1185 (9th Cir. 1998). In *Waucaush* v. *United States*, 380 F.3d 251, 254-258 (6th Cir. 2004), the court granted relief from the movant's conviction under 18 U.S.C. 1962, holding that the movant was "actually innocent" of engaging in activities "affect[ing] interstate commerce" because his enterprise was intrastate, non-economic, and without substantial effects on interstate commerce.

Those rulings, involving the fact-specific application of the "actual innocence" standard to entirely different statutes, do not support petitioner's challenge to his conviction for possessing child pornography under 18 U.S.C. 2252A(a)(5)(B).[2] To the contrary, those cases

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[2] Petitioner also refers in passing (Pet. 26) to the decision of the Sixth Circuit in *United States* v. *Boyd*, 312 F.3d 213 (2002). The court in *Boyd* reversed a sentencing enhancement based on Guidelines § 2G2.2(b)(2), notwithstanding the defendant's admission that he had attempted to send "pornographic child pornography" to a specified individual. See 312 F.3d at 219. The court of appeals characterized that admission as "no more than a conclusory description of the nature of the material in question, rather than evidence." *Ibid.* Here, by contrast, petitioner's admissions were specifically intended to establish a factual basis for his plea of guilty to the child pornography offense. The decision in *Boyd*, moreover, arose on direct appeal, and the defendant's challenge to the sentencing enhancement had been properly preserved in the district court. See *id.* at 215. The Sixth Circuit in

demonstrate that the court of appeals' articulation of the governing legal standard accords with settled law. See Pet. App. A5; *Montano*, 381 F.3d at 1274; *Waucaush*, 380 F.3d at 254; *Sanders*, 157 F.3d at 305; *Benboe*, 157 F.3d at 1184.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Boyd therefore had no occasion to apply the demanding "actual innocence" standard that governs petitioner's request for collateral review of a procedurally defaulted claim.

(2)

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Supreme Court of the United States

MICHAEL CERVINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page:

Table of Contents i

Table of Authorities ii

Petitioner's Reply to United States Brief in Opposition 1

1.) **THE GOVERNMENT CORRECTLY ARGUES THAT THE COURT OF APPEALS "ACTUAL INNOCENCE" DETERMINATION CONFLICTS WITH CASES INVOLVING FIREARMS AND RACKETEERING AS WELL AS PORNOGRAPHY; THIS MILITATES FOR CERTIORARI, NOT AGAINST** 1

Conclusion 3

TABLE OF AUTHORITIES

Page:

Cases

United States v. Benboe,
157 F.3d 1181; 1998 U.S. App. LEXIS 24417
(9th Cir. 1998).....1
United States v. Boyd,
312 F.3d 213; 2002 U.S. App. LEXIS 24483
(6th Cir. 2002).....2
United States v. Montano,
381 F.3d 1265; 2004 U.S. App. LEXIS 18159
(11th Cir. 200).....2
United States v. Sanders,
157 F.3d 302; 1998 U.S. App. LEXIS 25452
(5th Cir. 1998).....1
United States v. Waucaush,
380 F.3d 251; 2004 U.S. App. LEXIS 18137
(6th Cir. 2004).....1
Vasquez v. United States,
454 U.S. 975, 70 L.Ed.2d 396,
102 S.Ct. 528 (1981).....2

PETITIONER'S REPLY TO UNITED STATES BRIEF IN OPPOSITION

1.) THE GOVERNMENT CORRECTLY ARGUES THAT THE COURT OF APPEALS "ACTUAL INNOCENCE" DETERMINATION CONFLICTS WITH CASES INVOLVING FIREARMS AND RACKETEERING AS WELL AS PORNOGRAPHY; THIS MILITATES FOR CERTIORARI, NOT AGAINST

In the government's brief in opposition, their attorney argues that the cases cited by Mr. Cervini as conflicting with the actual innocence determination in his case[1] involve

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[1] *United States v. Sanders*, 157 F.3d 302; 1998 U.S. App. LEXIS 25452 (5th Cir. 1998) (fact that defendant "pleaded guilty to an indictment stating that he 'did knowingly...carry and use a firearm'" insufficient to preclude claim of actual innocence of carry and use of a firearm when meaning of word "use" subsequently changed by Supreme Court decision); *United States v. Waucaush*, 380 F.3d 251; 2004 U.S. App. LEXIS 18137 (6th Cir. 2004) (defendant "may be actually innocent" of activity affecting interstate commerce "even though he admitted as part of his plea that his activities "affected interstate commerce"); *United States v. Benboe*, 157 F.3d 1181; 1998 U.S. App. LEXIS 24417 (9th Cir. 1998) (statement in plea agreement "that he had a marijuana grow operation in his home and maintained a loaded firearm which he carried and/or used in relation to the marijuana grow and marijuana conspiracy" together with statement in plea colloquy "that he was involved in the distribution of marijuana and that he had 'possession of the firearm in the

firearms and racketeering as well as pornography. The government attorney argues that this fact militates against certiorari.

While it is true that the cases cited involve firearms and racketeering as well as pornography, this fact demonstrates how broadly Mr. Cervini's case can be applied in the courts below. This is a further and important consideration which strongly militates for grant of certiorari. *Vasquez v. United States*, 454 U.S. 975, 70 L.Ed.2d 396, 102 S.Ct. 528 (1981), not against certiorari as argued by the government attorney.

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use of the drug transaction'" and evidence that gun was found in room where narcotics transaction took place, was insufficient to preclude actual innocence of "use" of firearm in Drug Trafficking Crime, where Supreme Court changed meaning of word "use" after plea); *United States v. Montano*, 381 F.3d 1265; 2004 U.S. App. LEXIS 18159 (11th Cir. 200) (plea of guilty to "use of a firearm during and in relation to ... drug trafficking crime" did not preclude actual innocence when Supreme Court changed meaning of word "use" after plea). *Cf. United States v. Boyd*, 312 F.3d 213; 2002 U.S. App. LEXIS 24483 (6th Cir. 2002) (acquiescence "that the material he tried to send was 'pornographic child pornography,'" was "no more than a conclusory description of the nature of the material in question, rather than evidence").

CONCLUSION

For all of the foregoing reasons, Petitioner Michael Cervini respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming the District Court dismissal of his motion pursuant to 28 U.S.C. § 2255 without reaching the merits and **REMAND** to the court of appeals for reconsideration in light of *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998).

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